Supreme Court, U.S.
FILED

011615 APR 30 2002

OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

ROSEMARY J. MCLACHLAN, TRUSTEE OF THE MARY BUTSCHEK LIVING TRUST, ET AL.,
Petitioners,

v.

DONALD SIMON, AN INDIVIDUAL AND FORMER TRUSTEE OF THE NAVELLIER SERIES FUND, ET AL.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SAMUEL KORNHAUSER
Counsel of Record
LAW OFFICES OF SAMUEL KORNHAUSER
155 JACKSON STREET
SUITE 1807
SAN FRANCISCO, CA 94111
(415) 981-6281

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Under the analysis set forth in Chevron U.S.A., Inc. v. National Resources Defense Counsel, Inc. 467 U.S. 837 is the Securities and Exchange Commission's Rule 15a-4 [17 CFR §270.15a-4], which allows the independent trustees of a mutual fund to switch the investment advisor of that mutual fund without the prior vote of the shareholders, invalid because it conflicts with the unambiguously expressed intent of Congress in Section 15(a) of the Investment Company Act of 1940 [15 U.S.C. §80a-15(a)] which provides that it is "unlawful for any person to serve or act as investment advisor to a [mutual fund] except pursuant to a written contract which... has been approved by the vote of a majority of the outstanding voting securities of such [mutual fund]"...?

2. Do the trustees of a mutual fund, by replacing the fund's investment advisor without a prior shareholder vote, breach their fiduciary duties to the mutual fund shareholders under 15 U.S.C. §80a-35(a)?

3. Are persons, who conspire with, aid and abet the trustees of a mutual fund to switch the existing investment advisor of a mutual fund without prior shareholder approval and who actually serve and act as investment advisor to the mutual fund without the prior shareholder approval liable under 15 U.S.C. §80a-35(a) and/or state law for the harm caused by such improper switch?

4. Does applying the so-called business judgment rule - which creates a presumption that the directors of a corporation are not liable for their actions unless they act willfully or with gross negligence - to the actions of trustees of mutual funds, impermissibly conflict with 15 U.S.C.

§80a-35(a) which holds mutual fund trustees liable simply for breach their fiduciary duties?

5. Did the District Court and the Court of Appeals depart from the accepted and required procedures for ruling on a Rule 12(b)(6) motion to dismiss, as set forth in Hospital Building Co. v. Trustees of Rex Hospital 425 U.S 738 (1976), by ignoring and contradicting the factual allegations in Petitioners' First Amended Complaint?

6. Did the District Court and the Court of Appeals depart from accepted and required procedures under Rule 56 of the Federal Rules of Civil Procedure by granting (and affirming) defendants a summary judgment on grounds not even asserted by defendants but rather raised sua sponte by the Court and on the grounds that Petitioners produced no evidence of damages when, in fact, Petitioners did produce substantial evidence of damages?

PARTIES TO THE PROCEEDINGS

Petitioners are ROSEMARY J. McLACHLAN, Trustee of the Mary Butschek Living Trust; MARTIN BILLETT, an individual on his own behalf and on behalf of those similarly situated; WILLIAM RAUTENBERG, an individual on his own behalf and on behalf of those similarly situated; FAITH C. RAUTENBERG, an individual on her own behalf and on behalf of those similarly situated; MARK SHULTS, an individual on his own behalf and on behalf of those similarly situated; GAIL SULLIVAN, an individual on her own behalf and on behalf of those similarly situated; THOMAS SULLIVAN, an individual on his own behalf and on behalf of those similarly situated; LOUIS G. NAVELLIER, an individual and Trustee and Shareholder of the Navellier Series Fund on his own behalf as a Trustee on behalf of The Navellier Series Fund and as a class representative on behalf of those Navellier Series Fund shareholders similarly situated; NAVELLIER MANAGEMENT, INC., a Delaware Corporation, individually. Petitioners were plaintiffs in the District Court and Appellants and Cross-Appellees in the Ninth Circuit Court of Appeals.

Respondents are DONALD SIMON, an individual and former Trustee of The Navellier Series Fund; KENNETH SLETTEN, an individual and former Trustee of The Navellier Series Fund; LAWRENCE BIANCHI, an individual and former Trustee of The Navellier Series Fund; ARNOLD SCOTT an individual and former Trustee of the MFS Series Trust; ROY ADAMS, an individual; and MASSACHUSETTS FINANCIAL SERVICES, a corporation. Respondents were defendants in the District Court. Respondent Kenneth Sletten was also a Counterclaimant in the District Court. Respondents were

Appellees in the Ninth Circuit Court of Appeals. Respondent Kenneth Sletten was also a Cross-Appellant in the Ninth Circuit Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners to this Petition is a corporation which has a parent corporation and no publicly held corporation owns 10% or more of any petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

CORPORATE DISCLOSURE STATEMENT iv

TABLE OF CONTENTS vi

TABLE OF CITED AUTHORITIES ix

TABLE OF APPENDICES xii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 11

I. The Court of Appeals Has Decided, Incorrectly, an Important Question of Federal Law Which Has Never Been Decided by this Court (Or Any Other Court) and Which Should Be Decided by this Court, Namely, the Ninth Circuit Decided That the Securities and Exchange Commission Rule 15a-4 [17 CFR §270.15a-4] (Which Provides That the Trustees of a Mutual Fund Can Switch the Fund's Investment Advisor Without Prior Shareholder Approval) Is Valid Despite the Fact it Conflicts Directly with §15(a) of the Investment Company Act Which Requires That No One Can Act as Mutual Fund's Investment Advisor Without Prior Shareholder Approval. This Case of First Impression Is Important Because, If Not Corrected by this Court, it Sets a Precedent for the Trustees of the over 9,000 Mutual Funds (with Shareholder Investments of over 6.9 Trillion Dollars) to Switch the Shareholders' Chosen Investment Advisor Without Their Consent 11

II. The Ninth Circuit's Validation of Rule 15a-4 Not Only Conflicts with the Clearly Expressed Intent of Congress in Section 15a of the '40 Act, but Also Effectively Precludes Liability Against Mutual Fund Trustees and Those Who Conspire with or Aid and Abet Them in Switching Investment Advisors Without Prior Shareholder Approval under Section 36(a) of the '40 Act and State Law 22

III. The Ninth Circuit Sanctioned the District Court's Total Departure from the Accepted and Usual Requirements under Rule 12(b)(6) of the Federal Rules of Civil Procedure by Ignoring the Factual Allegations in Petitioners' Complaint in Order to Uphold a Rule 12(b)(6) Dismissal of Properly Alleged Causes of Action So as to Call for the Exercise of this Court's Supervisory Powers 25

IV. The Ninth Circuit Sanctioned the District Court's Total Departure from the Accepted and Usual Requirements under Rule 56 of the Federal Rules of Civil Procedure by Affirming the District Court's Summary Judgment on Grounds Raised Sua Sponte by the Court Which Were Not Raised by Defendants, and by Improperly Weighing and Deciding Conflicting Evidence and by Ignoring Petitioners' Evidence of Damages and by Relying on a Jury Verdict Where the Jury Did Not Even Have Before it the Claim That Was the Subject of the Summary Judgment So as to Call for the Exercise of this Court's Supervisory Powers 28

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1985) 18

Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000) 18

Chevron U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694 (1984) 16, 17

Della Penna v. Toyota Motor Sales U.S.A., 902 P.2d 740 (Cal. 1995) 27

Dole v. United Steelworkers of America, 494 U.S. 26, 110 S.Ct. 929, 1086 Ed. 2d 23 (1990) 17

Dunn v. Commodity Futures Trading Commission, 117 S.Ct. 913 17

Gilbert v. El Paso Co., 490 A.2d 1050 (Del. Ch. 1984) 25

Graw v. Los Angeles Metro Trans., 52 F.Supp. 2d 1152 29

Hocking. v. Dubois, 885 F.2d 1449 (9th Cir. 1989) . . . 17

Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S 738 (1976) 26

International Association of Heat & Frost Insulators & Asbestos Workers Local 42 v. Absolute Envtl. Serv., Inc., 814 F.Supp 392 (D. Del. 1996) 29

Jackson v. Smith, 254 U.S. 586,
41 S.Ct. 200, 65 L.Ed. 418 (1921) 25

Laventhol, Krekstein, Horwath & Horwath v. Tuckman,
Del. Supr., 372 A.2d 168 (1976) 25

Los Angeles Airways v. Davis,
687 F.2d 321 (9th Cir. 1982) 28

Lowell v. Mother's Cake & Cookie Co.,
(1978) 79 Cal. App. 3d 27, 29

Lutz v. Boas, 39 Del. Ch. 585,
171 A.2d 381 (Del. Ch. 1961) 23, 24

McLachlan et al. v. Simon,
31 F.Supp. 731 (N.D. Cal. 1998) 1

National Credit Union Administration v. First National Bank & Trust Co.,
522 U.S. 479, 118 S.Ct. 927,
140 L.Ed. 2d 1 (1998) 17, 18

Navellier et al. v. Sletten et al.,
262 F.3d 923 (9th Cir. 2001) 1

Pacific Gas & Electric v. Bear Stearn & Co.,
270 Cal. Rptr. 1 29

Rosenfeld v. Black,
445 F.2d 1337 (2nd Cir. 1971) 14, 21

Schlussberg v. Colonial Management, Inc.,
389 F.Supp 733 (D. Mass. 1974) 15

Securities and Exchange Commission v. Insurance Securities, Inc.,
254 F.2d 642 (9th Cir. 1958) 14

Securities and Exchange Commission v. Sloan,
436 U.S. 103, 98 S.Ct. 1702,
566 Ed. 2d 148 (1978) 17

Seidal v. Lee, 954 F.Supp 810 (D. Del. 1996) 24

Speagle v. Board of Fire Underwriters,
29 Cal. 2d 34 (1946) 29

TABLE OF APPENDICES

APP. A	January 30, 2002 Order Denying Petition For Rehearing And For Rehearing en banc	1a
APP. B	August 27, 2001 Opinion of the United States Court of Appeals for the Ninth Circuit	5a
APP. C	July 23, 1998 Opinion and Order of United States District Court For the Northern District of California	49a
APP. D	First Amended Class Action Complaint Dated February 27, 1998	74a
APP. E	Relevant Statutes	108a
APP. F	Investment Company Institute Table 20 – Monthly Statistics Of Mutual Funds	118a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. B) is reported at Navellier et al. v. Sletten et al. 262 F.3d 923 (9th Cir. 2001). The District Court decision is reported at McLachlan et al. v. Simon 31 F.Supp. 731 (N.D. Cal. 1998).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered August 27, 2001 (App. B). The Court of Appeals entered an order denying a timely petition for rehearing and suggestion for rehearing en banc on January 30, 2002 (App. A).

STATUTORY PROVISIONS INVOLVED

This case involves 15 U.S.C. §80a-15(a); 17 CFR §270.15a-4 [SEC Rule 15a-4]; and 15 U.S.C. §80a-35(a), each of which are set forth in App. E.

STATEMENT OF THE CASE

In 1993, Louis Navellier, a respected investment advisor with nearly Two Billion Dollars under management, formed a mutual fund, The Navellier Series Fund (The "Fund"). He also formed a Delaware investment advisory firm, Navellier Management, Inc. ("NMI) to manage the Fund based on Navellier's unique modern portfolio theory style of investing. NMI served as investment advisor to the Fund from 1993 through March 15, 1997 and from July 14,

1997 through the present, having its contract renewed annually (ER 319, ¶11).

In April 1996, personality conflicts developed between Navellier and his attorney and the independent trustees and their attorney when Navellier proposed to merge the Fund. This dispute resulted in the independent trustees terminating Navellier's attorney as attorney for the Fund.

On May 31, 1996, Respondent Mr. Adams (attorney for the independent trustees) sent NMI's attorney a request for financial and other information on NMI and "all related entities" under the pretext that the Trustees needed this information to consider whether to agree to Navellier's merger proposal. The Trustees had never requested financial information before in connection with renewing the investment advisory agreement, yet had previously renewed it three times between 1993 and May 1996. (ER 319, ¶61.) Navellier did not want to provide this highly confidential financial information or reveal his future business plans, particularly to people whom he did not trust. (RT 1906:5-1907:5.) However, he suggested that the attorneys meet, reach agreement on relevant information and that he would provide it. (TE 162; ER 319, ¶81) The Trustees rejected Navellier's proposal.

Instead, Mr. Adams asked Gene Gohlke, head of Compliance at the SEC to order Navellier to turn over the financial information. The SEC refused to order Navellier to turn over the information (TE 838, p. 2). Instead, the SEC suggested that the Trustees let the shareholders decide whether the Fund should be merged into The Performance Funds. (RT 2475:19-22; TE 1143; TE 202.) ["...it is the shareholders' money... let he shareholders decide who... they want to manage the Fund."] (ASER 2025, RT 2475:18-21.)

On November 11, 1996, at the SEC's urging, the independent trustees passed a resolution that "it would be in the best interests of the Fund shareholders to be able to vote on whether to merge the Fund into the Performance Funds." (TE 1143.) The Trustees also renewed NMI's Investment Advisory Agreement for four months, to March 15, 1997 without any of the financial information they had previously claimed to need. (TE 1143.)

At the same time, Respondents Simon, Sletten, Bianchi (the independent trustees) had a telephone conference during which they secretly decided to fire NMI and hire Massachusetts Financial Services ("MFS") as investment advisor before the shareholders could vote on NMI's merger proxy.[1] (RT 1683:15-17; TE 1149.) (TE 236, p. 5; TE 1211, p. 5; TE 692; TE 697.) MFS immediately agreed to be investment advisor. (TE 692; TE 697.)

Mr. Adams and James DesMarais, an in-house attorney for MFS, started immediately preparing for the transition. They prepared an agenda for the March 13, 1997 Board meeting to "terminate Navellier Management, Inc.'s investment advisory contract", they prepared draft proposals to terminate NMI and hire MFS, they arranged to get "their story straight" for the press if asked why Navellier had been replaced (TE 1165, p. 2), they prepared to contact Rushmore (the Fund's Custodian and Transfer Agent) to arrange for the transition (TE 1165, p. 6) and they prepared a sticker for the Fund prospectus and an agenda indicating that NMI and been "terminated" and MFS hired. (TE 1165, p. 2; TE 1166,

[1] If the shareholders voted to merge, NMI would remain as investment advisor to the Fund, but the independent trustees, their attorney Roy Adams, MFS and Scott, would have lost their jobs with Fund.

p. 2.) Mr. Navellier and Mr. Alpers, both Trustees of the Fund, were not informed of any of these actions. MFS was put in charge of preparing the materials for the meeting. No materials were sent to Mr. Navellier or to Mr. Alpers.

At the March 13,1997 Board meeting, Respondent Arnold Scott, an officer of MFS, and a number of other MFS officers were present by telephone. Mr. Simon began the meeting by calling the first item on the agenda, which was terminating NMI (TE 1166, p. 2; TE 14, p. 2). The independent trustees moved to terminate NMI, despite the fact that NMI's stock performance was excellent and there were no regulatory problems.

Mr. Navellier pleaded with the Trustees to reconsider terminating NMI. He urged them to let the shareholders decide who they wanted as investment advisor to the Fund. He pointed out that in any event the shareholders would have to vote within 120 days on whether to hire an advisor, so why not let them vote between MFS and NMI? He pointed out that the SEC had the merger proxy and was reviewing it and urged them to extend the NMI contracts for a short time so the shareholders could have an opportunity to vote on whether they wanted NMI or MFS as their investment advisor. (RT 1772:1-6). In fact, Mr. Navellier pointed out the dire consequences the shareholders would suffer if a change of advisor was made without prior shareholder approval, i.e. mass redemptions and adverse tax consequences. (TE 14.) The Respondents rejected all of Mr. Navellier's pleas and proposals. (TE 14.) The Respondents terminated NMI at the March 13, 1997 Board Meeting.

The Respondent Trustees did not consider whether there would be mass redemptions if NMI was replaced without a prior shareholder vote. (RT 399:10-18; RT 496:6-11.) They did not consider what would happen if the

shareholders did not vote to approve MFS. They did not consider how or who would invest the assets of the Fund if MFS was not approved. (RT 1020-1023.) Mr. Simon admitted that he never even considered that MFS would not be approved. (RT 1020:20-1023:17.) The Trustees admitted that they could have extended NMI's contract to allow the shareholder vote.[2] (RT 894:17-895:16; 1020:20-1021:3.) The only reason given for terminating NMI was personal, i.e. that they did not "trust" Navellier. (TE 14, p. 5.)

As a result of the switch from NMI to MFS, there were mass redemptions. Nearly 4,000 of the 8,000 shareholders redeemed out of the Fund almost immediately, reducing the Fund's assets from $195 million to $75 million. MFS took over and completely changed the investment style of the Fund and sold off most of the Fund's existing securities and purchased different stocks to fit its investment style, an investment style the shareholders had not chosen to invest in. This huge sell off generated unprecedented and needless capital gains taxes.

In short, the Defendant Trustees switched investment advisors because of a clash in personalities. The entire mess and the waste[3] could have been avoided if the Trustees had

---

[2] There was no immediate need to replace NMI on March 13, 1997. The Trustees were in total control. They had a 3-2 majority on the Board. Their legal counsel was in charge. They admitted that they were happy with NMI's stock picking performance. MFS was willing to become investment advisor if asked. There were no SEC problems and the Trustees had dropped their requests for information and the merger proxy was awaiting clearance by the SEC.

[3] As discussed infra, Respondents spent $589,000 of Fund assets (TE 1301) for the 15a-4 proxy to keep themselves in office. This amount could have been avoided if they had kept their promise to

simply let the shareholders vote before changing investment advisors.

After they fired NMI, Respondents moved to prevent Navellier from mounting an opposition to their proxy to have MFS hired as the investment advisor. They ordered Deloitte & Touche (the Fund's outside auditor) not to give its consent to Navellier's use of the Fund's 1996 financial statements (TE 1202) which consent was essential for Navellier to obtain SEC clearance of his merger proxy. (TE 100-105.)

They secretly met and discussed removing Messrs. Navellier and Alpers from the Board (while both were still Trustees) and then changed the by-laws to increase the number of Fund Trustees so they would then have a sufficient vote percentage - 67% (they needed more than 60%) - to remove Navellier and Alpers as Trustees. (TE 1195; TE 236; RT 296:16-301:8.) Respondents then tried to rush a shareholder vote on retaining MFS so Navellier would not have time to prepare an opposition proxy. (TE 236; RT 300:10-301:8.)

MFS, with the Trustees' authorization and ratification, pressured Merrill Corporation[4] not to assist Navellier in getting its proxy printed. (TE 101, p. 2.) MFS and the Trustees pressured Deloitte & Touche and William Ezell to retract his April 18, 1997 letter memorializing MFS's pressure regarding the consents. (TE 101, p. 2; TE 102, pp. 1, 2, 3; TE 103, p. 1.) (These documents were improperly excluded from evidence by the trial judge.) (RT 680.)

---

let the shareholders vote on the merger, because Navellier had agreed to pay for that proxy. (TE 1163, p. 11; TE 1143, p. 3.)

[4] Merrill Corp. provided proxy printing for MFS as well as for Navellier.

MFS and the Trustees pressured Deloitte & Touche to pressure the SEC to block or revoke SEC clearance of Navellier's merger proxy by claiming its consent was improperly obtained. (TE 104, pp. 2, 3; TE 101, p. 2; TE 102.) These documents were improperly excluded. (RT 680.)

MFS and the Trustees pressured Deloitte & Touche to resign as auditors of the Navellier Funds and to claim it was resigning because of disagreements with Navellier. (TE 104, p. 1; TE 101, p. 2; TE 102, p. 1; TE 103, p. 1; TE 177.) They wanted Deloitte & Touche to invent this story to put Navellier in a position of having to publicly disclose that its outside auditor had resigned in protest over disagreements with Navellier.[5] (TE 104, p. 1.)

MFS and the Trustees pressured the SEC to block or delay clearance of Navellier's proxies. (TE 104, pp. 1, 3; TE 102, p. 1; TE 103, p. 1, TE 238, pp. 1, 7; TE 1193, p. 3.; TE 177; TE 771, p. 1.) and attempted to put congressional pressure on the SEC to take action against Navellier. (TE 101-106; TE 10; TE 1229.)

MFS and Georgeson & Co. (the Trustees' proxy solicitor) pressured brokerage firms, which held large blocks of Fund shares in "street name," to treat the contested shareholder vote on whether to hire MFS as a "routine" vote to "renew" MFS's contract and to vote the street shares for

[5] Arthur Levitt, the Chairman of the SEC,had to send a letter to MFS to correct the distortion MFS and the Trustees were creating, i.e., that Navellier had improperly used consents which had caused Deloitte to resign. Mr. Levitt pointed out that Deloitte had not resigned in protest and that MFS itself had obtained Deloitte's consent for MFS and the Trustees to use the very same 1996 financials which Defendants were claiming Navellier could not use. (TE 845.)

MFS under New York Stock Exchange Rule 452, without the real shareholders ever having an opportunity to vote on whether to hire MFS.

The Respondent Trustees, including Arnold Scott,[6] wasted $589,000 of Fund assets on proxy solicitation and legal fees on their proxy efforts to remain in power (TE 1301.) (See App. D, ¶¶ 49-60, pp. 89a-93a.)

Despite their extraordinary efforts, Respondents still lost the proxy vote. Respondents (who only 120 days earlier had terminated NMI) then asked NMI to return as investment advisor. NMI did so. However, the damage had already been done. Nearly half of the shareholders and over half of the assets of the Fund had redeemed out within the first three weeks after the Trustees' switch from NMI to MFS.

Navellier and other shareholders sued the Trustees, MFS, Arnold Scott (an MFS appointed Trustee) and the Trustees' attorney, Roy Adams, for breach of fiduciary duty under federal and state law. NMI sued for interference with prospective economic advantage. Navellier, as a Trustee on behalf of the Fund, sued Respondents for corporate waste for spending nearly $600,000 of Fund assets on a proxy to entrench themselves in control of the mutual fund.

Early in the case, the trial court erroneously dismissed with prejudice all claims against MFS and Scott on the grounds that they were not actual fiduciaries on March 13, 1997 when Navellier was terminated, that they had the right as "competitors" to interfere with NMI's economic advantage

[6] Contrary to the Ninth Circuit's Opinion (App. B, p. 21a), Scott was a trustee of the Fund and authorized the needless proxy expenditure after March 15, 1997.

and that the waste flowed from the Trustees' March 13, 1997 termination even though the Complaint alleged otherwise. The Court also erroneously dismissed all claims against Roy Adams on the grounds that although he advised the independent trustees on how best to protect the shareholders' interests, he was not the shareholders' attorney and therefore owed no duty to the shareholders.

Five days before the jury trial began, the District Court granted the Trustees' motion for partial summary judgment dismissing Navellier's claim against the trustees for interference with prospective economic advantage (a $15 million claim). The District Court and Court of Appeals did not view the evidence in the light most favorable to Petitioners, nor did they limit themselves to a determination of whether material issues of fact existed. Rather, they improperly weighed the evidence and ignored Petitioners' evidence and sua sponte raised arguments that Respondents had not even made, as a basis for granting summary judgment.

Navellier tried the case and put on evidence that the Trustees had switched the Fund's investment advisor from NMI to MFS without prior shareholder approval. NMI asked for, but the Court refused to give, a jury instruction on the law, i.e. that under §15(a) of the '40 Act the Trustees could not switch investment advisor without first obtaining shareholder approval unless there was an emergency or unforeseen event. The Trustees admitted there was no emergency or unforeseen event that would have prevented a prior shareholder vote.

The Court also gave numerous jury instructions which erroneously set forth an erroneous business judgment rule presumption (that the trustees merely needed to believe that they were informed, rather than actually being informed) but

without a concomitant jury instruction regarding Defendants' '40 Act obligations. These errors gave the jury the inaccurate impression that the law provided that the Trustees could freely switch the investment advisor without a prior shareholder vote.

During the jury's deliberations, the jury asked to be given guidance on the '40 Act requirements. The Court denied their request. The jury then returned a general verdict in favor of Defendants. One of the jurors wrote a letter a day after the verdict indicating that she and a number of other jurors felt that the Trustees were liable but that because they did not have guidance as to the '40 Act requirements, they did not have a basis to decide whether there had been a breach of fiduciary duty. Petitioners timely appealed. On appeal, the SEC filed an amicus brief urging the Ninth Circuit to uphold the validity of its Rule 15a-4. On August 27, 2001, the Court of Appeals, deferring heavily to the SEC, affirmed the District Court's decisions holding, in part, that SEC Rule 15a-4 did not conflict with §15a of the '40 Act and therefore the trustees could switch the investment advisor without prior shareholder approval (App. B, pp. 35a-40a). On January 30, 2002, The Court of Appeals denied Petitioners' motions for rehearing and rehearing en banc (one judge voting for rehearing en banc) (App. A).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED, INCORRECTLY, AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NEVER BEEN DECIDED BY THIS COURT (OR ANY OTHER COURT) AND WHICH SHOULD BE DECIDED BY THIS COURT, NAMELY, THE NINTH CIRCUIT DECIDED THAT THE SECURITIES AND EXCHANGE COMMISSION RULE 15a-4 [17 CFR §270.15a-4] (WHICH PROVIDES THAT THE TRUSTEES OF A MUTUAL FUND CAN SWITCH THE FUND'S INVESTMENT ADVISOR WITHOUT PRIOR SHAREHOLDER APPROVAL) IS VALID DESPITE THE FACT IT CONFLICTS DIRECTLY WITH §15(a) OF THE INVESTMENT COMPANY ACT WHICH REQUIRES THAT NO ONE CAN ACT AS A MUTUAL FUND'S INVESTMENT ADVISOR WITHOUT PRIOR SHAREHOLDER APPROVAL. THIS CASE OF FIRST IMPRESSION IS IMPORTANT BECAUSE, IF NOT CORRECTED BY THIS COURT, IT SETS A PRECEDENT FOR THE TRUSTEES OF THE OVER 9,000 MUTUAL FUNDS (WITH SHAREHOLDER INVESTMENTS OF OVER 6.9 TRILLION DOLLARS) TO SWITCH THE SHAREHOLDERS' CHOSEN INVESTMENT ADVISOR WITHOUT THEIR CONSENT.

The judgment by the Ninth Circuit in this case – that the SEC's Rule 15a-4 [17 CFR §270.15a-4] (which allows trustees of a mutual fund to switch the fund's investment advisor without prior shareholder approval) is not in conflict with Congress' express intent in §15(a) of the '40 Act [15 U.S.C. §80a-15(a)] which prohibits anyone from acting as

investment advisor without a prior shareholder approval – is wrong and presents a case of first impression of national importance (App. B, pp. 35a-40a). The Ninth Circuit's decision is the first and only decision to determine the validity of Rule 15a-4. It affects virtually every one of the 9,000 mutual funds in existence and puts at risk and out of shareholder control, nearly 6.9 Trillion Dollars of shareholder mutual fund investments. (App. F) The Ninth Circuit's decision eviscerates Congress' express intent, as enacted in §15(a) of the '40 Act, that no-one can serve or act as an investment advisor without the prior vote of the shareholders. The Ninth Circuit decision allows the trustees to impose on the shareholders an investment advisor they did not choose - the very thing Congress legislated against in §15(a). The Ninth Circuit's published opinion provides a dangerous green light for mutual fund trustees to replace the shareholders' chosen investment advisors without prior shareholder approval.

This Court has never decided, but should decide, this important federal question.

In 1940, Congress passed the Investment Company Act of 1940 [15 U.S.C. §80a-1 et seq] (the "'40 Act") to correct the abuses rampant in the mutual fund industry. The legislative history is clear that Congress was concerned that trustees were making changes in the funds' investment advisors without the shareholders' prior consent. Since it was the shareholders' money that was at risk, Congress wanted the shareholders to make the decision on who managed their money. H.R. Doc. No. 279, 76th Congress, 1st Sess. (1940), part 2, Chapter IV, pp. 1024-27:

> Control of investment companies' funds was shifted to new managers without the consent of the public stockholders and in many cases

> without their prior knowledge. New managements often unscrupulously wasted the assets of these investment companies... Apparently the incumbent managements completely disregarded the fact that the public may have invested in a particular investment company on the basis of its estimate of the integrity, responsibility and investment abilities of the original management of such companies. Nevertheless, without the prior knowledge or consent of the stockholders, shifts in the management personnel and in the investment policies of investment companies were of frequent occurrence. (Emphasis added.)

Section 15(a) of the '40 Act [15 U.S.C. §80a-15(a)] was enacted to require a prior shareholder vote before a person could become investment advisor to the mutual fund. Section 15(a) clearly and unambiguously states this Congressional intent; it states in pertinent part:

> It shall be unlawful for any person to serve or act as investment advisor of a registered investment company, except pursuant to a written contract, which contract, ... has been approved by the vote of a majority of the outstanding voting securities of such registered company...

Section 15(a) of the '40 Act carries out Congress' mandate to protect shareholders and prevent a change of management without their prior consent, as set forth in §1(b)(6) of the '40 Act [15 U.S.C. §80a-1(b)(6)], which provides:

> ...it is hereby declared that the... interests of investors are adversely affected –
>
> ...
>
> (6) when ... management thereof is transferred, without the consent of the security holders.

Prior to the SEC's promulgation of Rule 15a-4, the courts were in accord.[7] Rosenfeld v. Black 445 F.2d 1337 (2nd Cir. 1971):

> ...the evil toward which the ['40] Act is directed is the transfer of control without a consent of the shareholders...

The court repeated this policy Id. at n. 10:

> When, as here, a new advisor is appointed, it is clear that §15(a) requires stockholder approval... Congress has decreed that a change in control terminates the contract so that the fund would be dealing with a new party... The policy behind §15(a) would thus seem to require that the new contract be approved by the fund's shareholders.

In Securities and Exchange Commission v. Insurance Securities, Inc. 254 F.2d 642, 649 (9th Cir. 1958), the Ninth Circuit rejected the SEC's effort to expand §15(a)(4) or §1(b)(6) of the '40 Act beyond the clear language of those provisions which require that no change of investment advisor can be made without shareholder approval. Id. at 649:

---

[7] The Ninth Circuit in this case is the first and only court to consider the validity of Rule 15a-4.

> This [change of investment advisor] according to the above quoted statutory finding [§1(b)(6)] is contrary to the... interest of investors, if accomplished without the consent of the investors.
>
> ...
>
> The circumstance which is objectionable under this statutory pronouncement is transfer of control without consent, however achieved...

Accord Schlussberg v. Colonial Management, Inc. 389 F.Supp 733, 739 (D. Mass. 1974)

Congress only gave the SEC authority in §6(c) of the '40 Act (15 U.S.C. §80a-6) to promulgate rules and regulations which exempt a transaction from the provisions of the title, if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

The SEC has conceded that its power under §6(c) of the '40 Act to make exceptions to the '40 Act is limited and exemptions must be necessary or appropriate, in the public interest and consistent with the protection of investors and the purposes of the Act. American Participations, Inc. 10 S.E.C. 430, 434-5; Hugh Baker 24 S.E.C. 202, 206. The SEC also has conceded that its power to make exceptions must "not be so freely applied by us that the basic objectives of the Act are thwarted." In the Matter of Transit Investment Corp. 28 S.E.C. 10, 15; Petroleum and Trading Corp. 11 S.E.C. 389, 392.

Despite the clearly expressed Congressional intent of §15(a), the SEC in 1980 issued Rule 15a-4 [17 CFR

§270.15a-4], which creates a blanket exemption from the §15(a) requirement of prior shareholder approval. Rule 15a-4 allows trustees (with or without cause) to replace an existing investment advisor with a different investment advisor without prior shareholder approval.

Rule 15a-4 provides in pertinent part:

> Notwithstanding section 15(a) of the act, a person may act as investment adviser for an investment company pursuant to a written contract which has not been approved by a majority of the outstanding voting securities of such company during the one hundred and twenty day period after the termination of an investment advisory contract by an event... described in paragraphs (3) or (4) of section 15(a) of the act or by the failure to renew such contract... (Emphasis added.)

Rule 15a-4, which freely permits trustees to change investment advisors without prior shareholder approval, directly conflicts with §15a which requires prior shareholder approval before the investment advisor can be changed.

The Ninth Circuit has adopted the SEC position and held that Rule 15a-4 is "fully consistent with Congressional intent and is... necessary to implement the purpose of the ['40 Act]" (App. B, p. 37a). The Ninth Circuit is wrong.

Petitioners respectfully submit that in this case of first impression, the Ninth Circuit, in upholding Rule 15a-4, has, in violation of the tenant of Chevron U.S.A. v. N.R.D.C. 467 U.S. 837, 842-43 n. 9 (1984), approved of an agency regulation which is in direct conflict with the clear Congressional intent of §15a of the Act.

The SEC's Rule 15(a)-4 is contrary to the express language of §15(a) on the very issue of requiring prior shareholder approval of the investment advisor. It is therefore invalid. Dunn v. Commodity Futures Trading Commission 117 S.Ct. 913, 920 n. 14; Dole v. United Steelworkers of America 494 U.S. 26, 42, 110 S.Ct. 929, 938, 1086 Ed. 2d 23 (1990); Securities and Exchange Commission v. Sloan 436 U.S. 103, 117-18, 98 S.Ct. 1702, 1711-12, 566 Ed. 2d 148 (1978); Chevron U.S.A. v. National Resources Defense Council, Inc. 467 U.S. 837, 104 S.Ct. 2778, 2781 n. 9, 81 L. Ed. 2d 694 (1984); Hocking. v. Dubois 885 F.2d 1449, 1458-59 (9th Cir. 1989) [rejecting SEC's amicus argument and interpretation].

While this Court will generally give great deference to an agency's interpretation of a statute, the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent." (emphasis added) Chevron supra 104 S.Ct. at 2781 n. 9. Where, as here, if Congress has directly spoken to the precise issue and the intent of Congress is clear, "that is the end of the matter; for the Court as well as the agency must give effect to the unambiguously expressed intent of Congress." Id at 2781. Accord, National Credit Union Administration v. First National Bank & Trust Co. 522 U.S. 479, 499-500, 118 S.Ct. 927, 938, 140 L.Ed. 2d 1 (1998).

The Ninth Circuit failed to adhere to the requirements of Chevron and disregarded the clearly expressed intent of Congress in §15(a). Instead, it impermissibly deferred to the SEC's amicus argument that Rule 15a-4 is necessary and reasonable. Where the law is clear, those arguments are irrelevant. The Court can go no further than the statutes clear language.

Moreover, the Ninth Circuit's decision would allow any fund's trustees to let an investment advisory contract lapse and replace the advisor without prior shareholder approval. Such unrestrained trustee power to change the investment advisor flies in the face of the explicit language and purpose of the ICA §§15(a) and 1(b)(6). The legislative history is clear that Congress was concerned that changes in investment advisors were taking place without the shareholders consent. Since it was the shareholders' money, Congress wanted the shareholders to make the decision. H.R. Doc. No. 279, 76th Congress, 1st Sess. (1940), part 2, Chapter IV, pp. 1024-27.

Rule 15(a)-4 totally eviscerates this shareholder power. If Rule 15(a)-4 were allowed to stand as interpreted by the Ninth Circuit, there would be no restraint on trustees changing the investment advisor without shareholder consent.[8] The trustees could, for no reason, replace the investment

[8] The Ninth Circuit suggests (App. B, p. 39a) that trustees' power to change an investment advisor is not unbridled because they still have to satisfy their fiduciary duties, including the duty to reasonably inform themselves and exercise their business judgment. But given the Ninth Circuit's erroneous (see Aronson v. Lewis 473 A.2d 805, 812 (Del. 1985); Brehm v. Eisner 746 A.2d 244, 259 (Del. 2000)) and nearly impossible standard of care under its interpretation of the business judgment rule in this case, i.e. the trustees only need to believe they are informed (App. B, pp. 40a-44a), there would, as here, be no real limit on the trustees' power under the business judgment rule. Nor does the Ninth Circuit, or any court, have the power to substitute its notion of what is reasonable when Congress has explicity spoken and specifically taken away from the trustees (and put exclusively in the hands of the shareholders) the right to pick the investment advisor. National Credit Union supra 522 U.S. at 499-500.

advisor without shareholder consent either by firing him/her or letting the contract lapse.

This unauthorized usurpation of shareholder control over investment advisor selection is not ameliorated by Rule 15a-4 requiring that the new ("temporary") investment advisor be approved by the shareholders within 120 (now 150) days. The damage has already been done once the new investment advisor takes over. In the real world, a fund will suffer mass redemptions (as happened here) if the investment advisor that the shareholders selected is removed. The person whom the shareholders selected to manage their money is suddenly gone without their approval. A switch in investment advisors is a switch in their investment. As one of the shareholders put it, "MFS has been around for 80 years. If I had wanted them to manage my money, I would have invested with them in the first place."

Compounding the problem is the existence of NYSE Rule 452. Rule 452 allows brokerage firms which hold customers' mutual fund shares in "street name" to vote those shareholders' shares in favor of management on "routine," "uncontested" matters.[9] Thus, by allowing an investment advisory contract to lapse and "hiring" a new investment advisor, management could (and did here) persuade brokerage firms that Rule 452 allows the brokerage firm to vote for the trustees' replacement investment advisor as a "routine" renewal of the investment contract,[10] (as opposed to entering

[9] The "renewal" of an existing advisory agreement is considered routine. Under Rule 452, if management designates a matter uncontested, the brokerage firm can "routinely" vote for management and does not have to pull back its street name votes if it later learns (after casting the votes) that it is a contested matter.

[10] If the new investment advisor has not been installed, i.e. is not yet managing, it is not a "renewal" and therefore not a routine

into a new contract) thereby depriving the shareholders of the right to ever vote on the investment advisor. That is what happened in this case and, if the Ninth Circuit decision is not reviewed by this Court, could happen in every mutual fund in the country. That is clearly contrary to the requirements of 15(a) of the '40 Act.

Second, Rule 15a-4 is not necessary. It is not necessary to promulgate a rule which allows the trustees to replace the fund's investment advisor before the shareholders vote, particularly where there is time for the shareholders to first vote. If there is no emergency and the shareholders can vote before a fundamental change (such as a change in investment advisor) is made, then under §15(a), they must be allowed to do so. In the present case, there was no emergency.[11]

Nor, as the Ninth Circuit and amicus SEC assert, is there any "gap" in the law that needs to be filled between shareholder approval under §15(a) and the trustees' right to terminate the investment advisor under §15(a)(3). It is an SEC self-created "gap." There is no need to give trustees power to replace the investment advisor without the shareholder vote, particularly absent an emergency. Where there is no

---

matter, so the brokerage firm cannot vote for management without specific shareholder direction. Thus, by using Rule 15a-4 to install an investment advisor (without shareholder approval) and then claiming that technically they are having a proxy on a "renewal" of that 15a-4 investment advisor, management is actually and effectively depriving the shareholders of ever voting on the investment advisor. This scenario (our scenario) is clearly in violation of §§1(b)(6) and (8) and 15(a) of the '40 Act.

[11] Indeed, Defendants admitted there was no emergency and a prior vote could have been taken (ASER 2038).

emergency, i.e., no "unavoidable lapse of time" before a new investment advisor can be voted on, there is no rational reason to prevent the shareholders from first deciding if they want to change advisors. Where there is an emergency (such as the advisor dying or becoming incapacitated (Leon B. Allen Fund, ICA Release No. 8298, April 3, 1974)) or some unforeseen event which requires an immediate replacement to protect the shareholders' interest in continued management, then perhaps the purposes and Congressional intent would be served by allowing a truly "unavoidable" replacement to manage the fund pending shareholder approval. However, that is not what Rule 15a-4 does. It gives blanket authority to the trustees without any exigency to switch investment advisors without a prior shareholder vote. Therefore, by any test, it is invalid.

This does not conflict with Congress' intent that the trustees have the power under §15a-3 to terminate the contract. That power is in no way diminished by the requirement of prior shareholder approval. If the trustees feel the advisor needs to be terminated, particularly where there is no emergency, then they can hold a shareholder vote and get their approval for the new advisor in advance of any termination. This is what is typically done. Rosenfeld v. Black 445 F.2d 1337 (2nd Cir. 1971). (The new advisor enters into a contract to manage but does not manage unless and until the shareholders approve.)

II. THE NINTH CIRCUIT'S VALIDATION OF RULE 15a-4 NOT ONLY CONFLICTS WITH THE CLEARLY EXPRESSED INTENT OF CONGRESS IN SECTION 15a OF THE '40 ACT, BUT ALSO EFFECTIVELY PRECLUDES LIABILITY AGAINST MUTUAL FUND TRUSTEES AND THOSE WHO CONSPIRE WITH OR AID AND ABET THEM IN SWITCHING INVESTMENT ADVISORS WITHOUT PRIOR SHAREHOLDER APPROVAL UNDER SECTION 36(a) OF THE '40 ACT AND STATE LAW

Section 36(a) of the '40 Act [15 U.S.C. §80a-35(a)] provides a private right of action against a person "serving or acting" as a director, member of any advisory board, or as investment advisor of a mutual fund, for any act or practice constituting a breach of fiduciary duty in respect of such mutual fund (App. E, p. 115a). Petitioners alleged that MFS and Scott were "acting" as de facto investment advisors or directors on and before March 13, 1997 when they persuaded, aided and abetted the independent trustees to terminate NMI without a prior shareholder vote. Petitioners alleged that MFS's and Scott's actions breached their '40 Act §36(a) and state law fiduciary duties because they were acting as investment advisors and trustees. (App. D, ¶¶43-47, pp. 86a-89a; ¶¶ 69-76, pp. 96a-97a.) The District Court granted, and the Ninth Circuit Court affirmed, MFS's and Scott's motion to dismiss as a matter of law, holding that they were not fiduciaries because they did not have a formal written contract with the Fund (App. B, pp. 16a-18a) and that a person does not "become subject to a fiduciary duty merely because it provided information about its services to the independent trustees." (App. B, p. 19a.) However, that is not what Petitioners alleged. Petitioners did not allege that MFS and Scott were "merely" "providing information about their

services." Petitioners alleged that MFS and Scott were actively engaged in removing NMI without a shareholder vote and were assisting and acting as investment advisors and directors by preparing documents, advising how to remove NMI, providing insurance to cover the trustees against liability for removing NMI, pursuant to their agreement (App. D, ¶47, p. 88a-89a). Contrary to the Ninth Circuit's opinion, Lutz v. Boas 39 Del. Ch. 585, 171 A.2d 381, 398 (Del. Ch. 1961) is directly on point and holds that where a person undertakes to act as investment advisor, he/she is liable for breach of fiduciary duty irrespective of any formal agreement:

> Certainly, the provisions of the Act requiring approval of the investment adviser's contract cannot be frustrated by the mere absence of a formal written contract if the evidence shows a contract implied in fact between the pertinent parties. To adopt Model's approach would be to permit the parties to determine 'by form' whether or not they desired to be covered by this phase of the Act. To state this possibility is to reject it in view of the purposes of the Act.

MFS and Scott are as alleged charged with breach of their fiduciary duties to Plaintiffs for their actions before March 13, 1997, and on March 13, 1997 in "acting"[12] as investment advisors and trustees and after March 15, 1997 for their actions after March 15, 1997 when they were formally serving as investment advisor and trustee.

[12] If, under the Ninth Circuit's construction, the term "acting" as investment advisor in §36(a) meant that the previous actions had to be pursuant to a formal written contract, then the term "acting" would be superfluous in light of the statute's term "serving."

Petitioners alleged that on or before March 13, 1997, MFS and Scott were advising the Fund's Independent Trustees on who to hire and manage the Fund's assets, i.e., acting as an advisory board to the Fund (ER 120 ¶ Nos. 43-47) and that MFS and Scott were advising the Trustees not to let the shareholders first decide whether to terminate Navellier and/or hire MFS and advised and directed the Trustees to terminate Navellier, i.e. MFS and Scott were giving advice on how the Fund's assets should be managed and by whom. Thus, MFS and Scott were, in substance, acting as Trustee and Investment Advisor prior to March 13, 1997, irrespective of the lack of a formal agreement. Lutz v. Boas supra.

Section 2(a)(1) [15 U.S.C. §80a-2(a)(1)] of the Investment Company Act defines "Advisory Board" as a board "whether elected or appointed which is distinct from the board of . . . trustees of an investment company and which is composed solely of persons who do not serve such company in any other capacity..."

Also, "recommending or approving" improper actions can be a §36(a) violation. Seidal v. Lee 954 F.Supp 810, 818, 819 (D. Del. 1996).

Moreover, MFS, serving as investment advisor to the Fund without prior shareholder approval on March 15, 1997 and thereafter, in direct violation of §15(a) of the '40 Act, [13] was by itself a breach of its fiduciary duty and therefore a

[13] The Court's failure to give this instruction as to the requirements of the '40 Act left the jury with no instruction on the law regarding the Trustees' duties under the '40 Act. The jurors manifested this lack of guidance by asking for the '40 Act (RT 2728:24-2729:8) and by indicating that the lack of '40 Act guidance left the jury with no alternative but to rule in favor of Defendants (ER 2023).

violation of §36(a).

In addition, under Delaware common law, one who acts, assists, or directs a fiduciary to break his/her/its fiduciary duty is also liable for the breach. Gilbert v. El Paso Co. 490 A.2d. 1050, 1057 (Del. Ch. 1984):

> It is well settled that a third party who knowingly participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship. Jackson v. Smith, 254 U.S. 586, 589, 41 S.Ct. 200, 201, 65 L.Ed. 418 (1921); Laventhol, Krekstein, Horwath & Horwath v. Tuckman, Del. Supr., 372 A.2d 168, 170 (1976).

Thus, even if, arguendo, §36(a) did not apply to pre-March 15, 1997 acts by MFS and Scott, they would still be liable under Delaware common law (ER 120, ¶s 43-47, 74-75) for their actions in directing the Trustees to breach their fiduciary duty.

III. THE NINTH CIRCUIT SANCTIONED THE DISTRICT COURT'S TOTAL DEPARTURE FROM THE ACCEPTED AND USUAL REQUIREMENTS UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE BY IGNORING THE FACTUAL ALLEGATIONS IN PETITIONERS' COMPLAINT IN ORDER TO UPHOLD A RULE 12(b)(6) DISMISSAL OF PROPERLY ALLEGED CAUSES OF ACTION SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

Review is required because the Ninth Circuit affirmed the Rule 12(b)(6) dismissal of Petitioners' claims against MFS

and Scott based on "facts" not alleged in Petitioners' Complaint and ignored the pertinent facts alleged in the Complaint.

The Ninth Circuit affirmed the dismissal of state law breach of fiduciary duty claims against MFS and Scott because they supposedly were not fiduciaries when the trustees decided not to renew NMI's contract (App. B, p. 19a). This ignores the facts as alleged in the Complaint (ER 120, ¶49) that MFS acted as investment advisor and therefore was a fiduciary under §36(a) and state law before March 15, 1997. It also ignores the allegations that after March 15, 1997, MFS served as investment advisor and that Scott became a trustee (and therefore a fiduciary) and that both engaged in breaches of their fiduciary duties by trying to entrench themselves in their positions after March 15, 1997 and by using Fund assets to fund a proxy to keep themselves in office, which was contrary to the shareholders' interests (ER 120, ¶¶47-60). Irrespective of whether the Ninth Circuit believed these allegations, the Court was required to accept them as true for purposes of a 12(b)(6) motion. Hospital Building Co. v. Trustees of Rex Hospital 425 U.S. 738, 740, 965 S.Ct. 1848, 1850 (1976).

The Ninth Circuit also incorrectly held that no waste claim could be alleged because MFS and Scott were not directors when NMI was terminated. However, the Ninth Circuit overlooks Appellants' Complaint (App. D, ¶49, 59-60) which alleges that Scott was a director and directed the unnecessary expenditure of Fund assets for the needless proxy after he became a trustee.

The Ninth Circuit affirmed the dismissal of NMI's interference claims against MFS and Scott holding that the competition privilege applies to MFS's and Scott's actions and that nothing about their competitive conduct was wrongful

(App. B, p. 22a). Again the Ninth Circuit misapplied the law of California and overlooked the wrongful conduct alleged in Petitioners' Complaint, i.e. inducing the trustees to breach their fiduciary duty by terminating NMI without prior shareholder approval, by interfering with the Fund shareholders' right to a fair proxy vote in order to entrench MFS and Scott and deprive NMI of its advisory contract, by improperly changing the Board of Trustees to kick off Navellier, by pressuring the SEC and proxy solicitors to block NMI's opposition proxy, etc. (App. D, ¶¶47-60). All of these actions were wrongful by means beyond the interference (inducing the initial termination of NMI) itself. The issue of whether these acts are wrongful is a factual issue for the jury. Della Penna v. Toyota Motor Sales U.S.A. 902 P.2d 740 (Cal. 1995) at p. 393; Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d.

IV. THE NINTH CIRCUIT SANCTIONED THE DISTRICT COURT'S TOTAL DEPARTURE FROM THE ACCEPTED AND USUAL REQUIREMENTS UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE BY AFFIRMING THE DISTRICT COURT'S SUMMARY JUDGMENT ON GROUNDS RAISED SUA SPONTE BY THE COURT WHICH WERE NOT RAISED BY DEFENDANTS, AND BY IMPROPERLY WEIGHING AND DECIDING CONFLICTING EVIDENCE AND BY IGNORING PETITIONERS' EVIDENCE OF DAMAGES AND BY RELYING ON A JURY VERDICT WHERE THE JURY DID NOT EVEN HAVE BEFORE IT THE CLAIM THAT WAS THE SUBJECT OF THE SUMMARY JUDGMENT SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

First, the Ninth Circuit apparently decided as a matter of law that because the investment advisory Agreement between NMI and the Fund was terminable at will that there was no reasonable probability that NMI would continue as investment advisor (App. B, p. 24a).

Indeed, Respondents' sole arguments in support of their summary judgment motion on the interference with economic advantage claims were solely issues of law, i.e., that because the contract was terminable at will, there was no economic expectancy. Thus, there was no requirement by Petitioners to "present evidence demonstrating a reasonable probability that NMI would continue." Indeed, Petitioners rebutted Respondents legal arguments and cited law, i.e. the fact that a contract is at will does not allow the corporate directors to terminate it for their own purposes. Los Angeles

Airways v. Davis 687 F.2d 321, 325-26 (9th Cir. 1982); International Association of Heat & Frost Insulators & Asbestos Workers Local 42 v. Absolute Envtl. Serv., Inc. 814 F.Supp 392, 400 (D. Del. 1996). Pacific Gas & Electric v. Bear Stearn & Co. 270 Cal. Rptr. 1, 4 [it is the contractual relationship, not the at will contract, that is protected]; Speagle v. Board of Fire Underwriters 29 Cal. 2d 34, 39-40 (1946); Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d. (Appellants' Reply Brief, pp. 32-39.) The District Court agreed with Petitioner's legal authority but sua sponte claimed no evidence had been produced by Petitioners.

However, Petitioners did come forward with evidence that there was a strong probability that NMI would have continued as investment advisor. Petitioners presented evidence that the contract had been renewed four times, that NMI was again hired after the shareholders rejected MFS and that NMI continues as the investment advisor to this day. If, as the Court states, NMI could only establish a claim for interference by showing that the wrongdoers would have renewed the contract, then no victim of interference by the officers of the prospective contracting party could ever recover because the tortfeasor directors (even if, as here, acting for their own interests) could obtain summary judgment by terminating the at will economic relationship (even for improper motives). That is not the law. International Association of Heat & Frost Insulators & Asbestos Workers Local 42 v. Absolute Envtl. Serv., Inc. supra at 400; Graw v. Los Angeles Metro Trans. 52 F.Supp. 2d 1152, 1154-55. The trustees' motivations in terminating NMI are and should have been presented to the jury. [14]

[14] Nor can the Ninth Circuit rely on a subsequent jury verdict (App. B., p. 24a) as a basis for upholding the summary judgment. The jury was not presented with jury instructions on interference which would have been substantially different, i.e., no business

Likewise, damages are not made speculative because the contract is at will and the tortfeasor directors can terminate it. Restatement of Torts 2d §774A.

Likewise, there was no basis for the District Court or the Ninth Circuit to say there was no evidence of damages. NMI presented evidence of annual fees of over $1 millon from the Fund. NMI also came forward with a damage expert who demonstrated that Navellier lost in excess of $3 million in lost advisory fees due to the termination (ASER 349, Ex. 138).

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,
LAW OFFICES OF
SAMUEL KORNHAUSER

By: Samuel Kornhauser
Attorney for Plaintiffs-Appellants

---

judgment rule – different evidence, different argument. So the outcome could have been totally different had they been presented with the interference claim.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Nos. 99-17059, 99-17061, and 99-17388
D.C. No. CV-97-01258-WHO
(N. District of California)

[Filed January 30, 2002]

LOUIS G. NAVELLIER, an individual and Trustee and Shareholder of the Navellier Series Fund (recently renamed the MFS Series Trust); ROSEMARY J. MCLACHLAN; MARTIN BILLETT; WILLIAM RAUTENBERG; FAITH C. RAUTENBERG; MARK SCHULZ; GAIL SULLIVAN; THOMAS SULLIVAN,	)
Plaintiffs-Appellants,	)
v.	)
KENNETH SLETTEN, an individual and Trustee of the Navellier Series Fund (recently renamed the MFS Series Trust); DONALD SIMON, et al.,	)
Defendants-Appellees.	)
----------	)
LOUIS G. NAVELLIER, an individual	)

and Trustee and Shareholder of the Navellier Series Fund (recently renamed the MFS Series Trust); ROSEMARY J. MCLACHLAN; MARTIN BILLETT; WILLIAM RAUTENBERG; FAITH C. RAUTENBERG; MARK SCHULZ; GAIL SULLIVAN; THOMAS SULLIVAN,

Plaintiffs-Appellants,

v.

KENNETH SLETTEN, an individual and Trustee of the Navellier Series Fund (recently renamed the MFS Series Trust); DONALD SIMON, et al.,

Defendants,

and ARNOLD SCOTT; ROY ADAMS; MASSACHUSETTS FINANCIAL SERVICES,

Defendants-Appellees.

ROSEMARY J. MCLACHLAN, et al.; LOUIS G. NAVELLIER, an individual and Trustee and Shareholder of the Navellier Series Fund (recently renamed the MFS Series Trust); MARTIN BILLETT; WILLIAM RAUTENBERG; FAITH C. RAUTENBERG; MARK SCHULZ; GAIL SULLIVAN; THOMAS SULLIVAN,

Plaintiffs-Appellants/Cross-Appellees,	)
	)
v.	)
	)
DONALD SIMON,	)
	)
Defendant,	)
	)
and	)
	)
KENNETH SLETTEN, an individual and Trustee of the Navellier Series Fund (recently renamed the MFS Series Trust),	)
	)
Defendant-Appellee/Cross-Appellant.	)
	)

BEFORE
Canby, Hawkins, and Gould, Circuit Judges.

ORDER

Plaintiff-Appellants motion to file errata and additional information to the petition for rehearing en banc is GRANTED.

The panel has unanimously voted to deny the petition for rehearing. Judges Hawkins and Gould have voted to deny the petition for rehearing en banc, and Judge Canby so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case Nos. 99-17059, 99-17061, and 99-17388

[Filed August 27, 2001]

LOUIS G. NAVELLIER, an individual and Trustee and Shareholder of the Navellier Series Fund (recently renamed the MFS Series Trust); ROSEMARY J. MCLACHLAN; MARTIN BILLETT; WILLIAM RAUTENBERG; FAITH C. RAUTENBERG; MARK SCHULZ; GAIL SULLIVAN; THOMAS SULLIVAN,

Plaintiffs-Appellants,

v.

KENNETH SLETTEN, an individual and Trustee of the Navellier Series Fund (recently renamed the MFS Series Trust); DONALD SIMON, et al.,

Defendants-Appellees.

LOUIS G. NAVELLIER, an individual and Trustee and Shareholder of the Navellier Series Fund (recently renamed

the MFS Series Trust); ROSEMARY J. MCLACHLAN; MARTIN BILLETT; WILLIAM RAUTENBERG; FAITH C. RAUTENBERG; MARK SCHULZ; GAIL SULLIVAN; THOMAS SULLIVAN,

Plaintiffs-Appellants,

v.

KENNETH SLETTEN, an individual and Trustee of the Navellier Series Fund (recently renamed the MFS Series Trust); DONALD SIMON, et al.,

Defendants,

and ARNOLD SCOTT; ROY ADAMS; MASSACHUSETTS FINANCIAL SERVICES,

Defendants-Appellees.

ROSEMARY J. MCLACHLAN, et al.; LOUIS G. NAVELLIER, an individual and Trustee and Shareholder of the Navellier Series Fund (recently renamed the MFS Series Trust); MARTIN BILLETT; WILLIAM RAUTENBERG; FAITH C. RAUTENBERG; MARK SCHULZ; GAIL SULLIVAN; THOMAS SULLIVAN,

Plaintiffs-Appellees,

v.)
)
KENNETH SLETTEN, an individual and)
Trustee of the Navellier Series Fund)
(recently renamed the MFS Series Trust),)
)
Defendant-Appellant,)
)
and DONALD SIMON,)
)
Defendant.)
_____)

BEFORE
William C. Canby, Jr., Michael Daly Hawkins,
and Ronald M. Gould, Circuit Judges.
Opinion by Judge Gould.

OPINION

This appeal follows an Investment Company Act of 1940 ("ICA") action seeking to impose personal liability on the independent trustees of a mutual fund for the non-renewal of an investment advisory contract. After a fourteen-day trial, the jury determined that the independent trustees acted within their discretion under the business judgment rule in replacing the investment adviser.

Plaintiffs-Appellants are: (1) shareholders and former shareholders of the Navellier Series Fund ("Fund"); (2) the original investment adviser of the Fund, Navellier Management, Inc. ("NMI"); and (3) Louis Navellier, an interested trustee of the Fund (collectively, "appellants"). Defendants-Appellees are: (1) three former independent

trustees of the Fund -- Donald Simon, Kenneth Sletten, and Lawrence Bianchi (collectively, "independent trustees"); (2) Roy Adams, counsel for the independent trustees; (3) Massachusetts Financial Services ("MFS"), former investment adviser of the Fund; and (4) Arnold Scott, former trustee of the MFS Series Trust (collectively, "appellees").

Appellants challenge the district court proceedings on numerous grounds, complaining about pre-trial, trial, and post-trial rulings. Sletten cross-appeals both an imposition of sanctions against him and his counsel, and the dismissal of his counterclaim for breach of contract. We reject all of appellants' many claims, uphold the jury verdict exonerating the independent trustees, and affirm the judgment of the district court against appellants. On Sletten's cross-appeal, we affirm dismissal of his counterclaim but grant limited relief, holding that the district court abused its discretion in affirming the imposition of sanctions against cross-appellant Sletten and his counsel.

FACTS AND PROCEDURAL BACKGROUND

On May 15, 1993, Navellier organized the Fund as a Delaware business trust that would invest in an open-ended investment company or mutual fund. Navellier and one of his employees, Jack Drinkwater,[1] served as interested trustees, while Simon, Sletten, and Bianchi served as independent

---

[1] In July 1995, Drinkwater resigned as an interested trustee and was replaced by Alan Alpers, another employee of Navellier's.

trustees.[2] Sam Kornhauser, Navellier's attorney, was hired as Fund counsel.[3]

On the day the Fund was organized, the Fund entered into an investment advisory agreement with NMI. Under this agreement, NMI provided investment advice and managed the Fund's assets. The initial term of the investment advisory contract was two years, annually renewable if approved by a majority of the independent trustees.

In January 1995, the independent trustees sought independent counsel. In October 1995, they hired Adams, an experienced mutual fund attorney, as independent counsel. Adams advised the independent trustees that, to fulfill their fiduciary obligations to the shareholders of the Fund, it was necessary to obtain certain financial information about NMI in order to conduct their annual review of the investment advisory agreement. Adams also told the independent trustees that he had concern about Kornhauser's abilities. Adams

---

[2] The ICA provides that boards of directors of investment companies must be composed of "interested" and "non-interested" or "independent" persons. An "interested" person is generally defined as any person having a direct or indirect financial interest in an investment company. 15 U.S.C. §§ 80a-2(a)(19), 80a-2(a)(3). No registered investment company shall have a board of directors more than sixty percent of the members of which are persons who are interested persons of such registered company. 15 U.S.C. § 80a-10(a).

[3] We note that Samuel Kornhauser, counsel for Navellier, NMI, and former counsel for the Fund, represented appellants at trial and on this appeal.

expressed the opinion that Kornhauser should not continue as counsel for the Fund while he remained counsel for NMI, Navellier, and Navellier's other businesses.

At a board of trustees' meeting on April 26, 1996, Navellier presented a motion to the trustees of the Fund to merge the Fund into the Navellier Performance Funds. This merger would have been a tax-free reorganization. The assets of the Fund would have been transferred to a portfolio of the Navellier Performance Funds in exchange for the shares of the Navellier Performance Funds. The merger would have terminated the independent trustees' positions.

The independent trustees deferred consideration of Navellier's merger proposal because they concluded that" further consideration would be premature given that the disinterested Trustees did not have any advance notice or information as to the relative merits of the proposal." The next order of business for the meeting was the annual review of the investment advisory agreement. The independent trustees expressed frustration at being asked to review and approve the investment advisory agreement without having received requested information from Kornhauser or NMI. The independent trustees then voiced their concern as to whether Kornhauser should continue as counsel to the Fund. A contentious discussion ensued, after which Navellier threatened to terminate his relationship with the Fund and left the meeting. The independent trustees then voted to remove Kornhauser as counsel to the Fund.

The independent trustees conditioned their future consideration of the merger proposal on review of certain information concerning the finances of Navellier and his

companies. After Navellier refused to provide this information, the independent trustees contacted the Securities and Exchange Commission ("SEC") in an effort to compel Navellier to produce the information. This effort to obtain the SEC's assistance in compelling this information did not succeed. Thereafter, the independent trustees decided to put Navellier's proposed merger to a shareholder vote by way of a proxy prepared by NMI.

Pending resolution of the merger proposal, the independent trustees held a board of trustees meeting on March 13, 1997, and voted not to renew NMI's investment advisory contract, which was scheduled to expire by its terms on March 15, 1997. The independent trustees also voted to hire MFS as the Fund's investment adviser. MFS conditioned its agreement to become investment administrator on assurances that the current trustees would not continue as trustees after the vote of the Fund's shareholders.

Navellier and Alpers filed a complaint on April 9, 1997, seeking to enjoin the independent trustees from removing them as interested trustees. Navellier also requested injunctive relief to block the investment advisory agreement with MFS so NMI could regain its former position as investment adviser.

On April 10, 1997, the independent trustees voted to remove Navellier and Alpers from their positions as interested trustees. According to appellants, the independent trustees undertook this allegedly wrongful act to entrench themselves more completely, to neutralize opposition to their upcoming proxy, and to ratify their decision to hire MFS. The independent trustees then eliminated the two positions

formerly held by Navellier and Alpers, reducing the trustees of the Fund.

On May 23, 1997, after the reorganization of the board of trustees, a shareholder vote was held to determine whether MFS should continue as investment adviser to the Fund. The proposal to retain MFS failed, receiving less than the required two-thirds vote of shareholders. Navellier refused to return to the Fund unless the independent trustees released him from liability and agreed to resign as trustees. The independent trustees signed a release, returned management of the Fund to NMI, and resigned.

On February 24, 1998, appellants filed a first amended class action complaint. The amended complaint alleged the following claims: (1) breach of fiduciary duty under the ICA and Delaware law against the independent trustees, MFS, and Scott; (2) breach of fiduciary duty and negligence under California law against Adams; and (3) waste and intentional interference with prospective economic advantage against all defendants. The independent trustees answered and filed a counterclaim for indemnity. Sletten also filed a separate counterclaim for breach of contract and bad faith. The district court made several pre-trial rulings, which left for trial only appellants' claims for breach of fiduciary duty and waste against the independent trustees and the independent trustees' counterclaims for indemnification. The district court later dismissed appellees' indemnity counterclaims without prejudice on appellees' motion.

Jury trial commenced on June 21, 1999. After a fourteen-day trial, the jury returned a unanimous verdict for the independent trustees on all claims. The district court

entered judgment on August 24, 1999. On September 8, 1999, appellants filed motions for judgment as a matter of law and for a new trial. The district court denied both motions. This appeal and cross-appeal followed.

DISCUSSION

I. Pre-Trial Rulings

A. Dismissal of claims against Adams

Appellants contend that the district court erroneously dismissed the claims against Adams for breach of fiduciary duty and negligence pursuant to Federal Rule of Civil Procedure 12(b)(6). We disagree.

We review de novo a district court's dismissal of a complaint for failure to state a claim upon which relief can be granted. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence." *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1267, 266 Cal. Rptr. 483 (1990). *See also Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App. 3d 692, 701, 282 Cal. Rptr. 627 (1991) ("An attorney generally will not be held liable to a third person not in privity of contract with him since he owes no duty to anyone other than his client.").

Applying California law, which the parties agree is controlling here, the California Supreme Court has explained that the determination of whether the duty undertaken by an

attorney extends to a third person not in privity involves the balancing of various factors. These factors include: (1) "the extent to which the transaction was intended to affect the plaintiff," (2) "the foreseeability of harm to him," (3) "the degree of certainty that the plaintiff suffered injury," (4)" the closeness of the connection between the defendant's conduct and the injury suffered," (5) "the moral blame attached to the defendant's conduct," and (6) "the policy of preventing future harm." *Goodman v. Kennedy*, 18 Cal. 3d 335, 556 P.2d 737, 742, 134 Cal. Rptr. 375 (Cal. 1976) (internal quotation marks and citation omitted).

Applying these factors here, the district court correctly held that Adams, by advising the independent trustees, did not assume a duty of care to the Fund's shareholders. The district court reasoned that the shareholders were not the intended beneficiaries of Adams' counsel to the independent trustees; the harm alleged by the appellants (i.e., capital gains taxes) was not a foreseeable result of Adams' conduct; the connection between Adams' advice to the independent trustees and the alleged injury was remote and tenuous; no moral blame could be attached to Adams' conduct in advising the independent trustees of their obligations under the law; and strong public policy reasons militated against finding any duty owed by Adams to the shareholders.

We see no sound basis for disagreement with this analysis. Adams was representing the independent trustees. Nothing in that relationship suggested that he owed a duty to the shareholders of the Fund. To imply such a duty would be contrary to the sound policy requiring his undivided loyalty to his clients. We hold that the district court properly dismissed

appellants' claims against Adams for breach of fiduciary duty and negligence.

B. Dismissal of ICA claims against MFS and Scott

Appellants contend that the district court erroneously dismissed their claims against MFS and Scott for breach of fiduciary duty under the ICA pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court addressed three theories in dismissing appellants' claims against MFS and Scott for breach of fiduciary duty under the ICA. We address each theory in turn.

1. Fiduciary Duty

The ICA expressly provides that decisions regarding the renewal of investment advisory contracts are within the sole discretion of a fund's independent trustees.

> It shall be unlawful for any registered investment company having a board of directors to ... renew ... any contract or agreement ... whereby a person undertakes regularly to serve or act as investment adviser ... for such company, unless the terms of such contract or agreement and any renewal thereof have been approved by the vote of a majority of directors, who are not parties to such contract or agreement or interested persons of any such party ....

15 U.S.C. § 80a-15(c) (emphasis added).

MFS is not alleged to have been, and never was, a trustee of the Fund. In fact, MFS did not become the Fund's investment adviser until March 15, 1997, two days after the

independent trustees decided not to renew NMI's contract. Further, according to the Declaration of Trust, a trustee must be a natural person. Similarly, the independent trustees did not appoint Scott as a trustee of the Fund until April 13, 1997, nearly one month after the independent trustees voted not to renew NMI's contract. Additionally, because Scott was an officer and director of MFS, he served as an interested trustee of the Fund. By the plain terms of the ICA, interested persons are prohibited from participating in the vote to retain or replace an investment adviser. *See* 15 U.S.C. § 80a-15(c).

The district court properly concluded that neither MFS nor Scott were trustees to the Fund -- and therefore did not owe a fiduciary duty to the shareholders -- when the independent trustees decided to change investment advisers.

2. De Facto Investment Adviser

Appellants argue that MFS and Scott owed a fiduciary duty because they "were, in substance, acting as Trustee and Investment Adviser prior to March 15, 1997, irrespective of a formal agreement." The contention that MFS and Scott were "de facto" investment advisers has no basis in law and is contrary to the plain language of the ICA.

Appellants rely on *Lutz v. Boas*, 39 Del. Ch. 585, 171 A.2d 381 (Del. Ch. 1961). Lutz, however, does not support the argument that a party becomes a trustee or investment adviser to fund shareholders simply by advocating its investment advisory services to the trustees. Rather, Lutz provides that where the agent of an investment advisory company enters into an explicit agreement with and receives compensation from a fund for advisory services, with the

knowledge of the investment advisory company, the company cannot avoid ICA regulation by refusing to enter into a formal Investment Advisory Services agreement. 171 A.2d at 389-90.

Here, appellants failed to allege that MFS or Scott entered into any agreements -- even informal ones -- or that they received compensation for any purported advisory services. Lutz does not support appellants' theory that MFS and Scott were de facto trustees or investment advisers under the ICA.

Appellants also contend that they are helped by the terms "Advisory Board" and "Director" under the ICA, arguing that MFS became an "Advisory Board" and Scott a" Director" because they urged the independent trustees to replace NMI. This argument fails under the plain language of the ICA.

The ICA defines "Advisory Board" as an " elected or appointed" board with "advisory functions as to investments." 15 U.S.C. § 80a-2(a)(1) (emphasis added)." Director" is defined as "any director of a corporation or any person performing similar functions with respect to any organization." 15 U.S.C. § 80a-2(a)(12). Appellants have not alleged that MFS was elected or appointed in any capacity prior to the independent trustees' non-renewal of NMI's contract. Nor have appellants alleged that Scott was performing the functions of a director before the non-renewal of NMI's contract.

The district court properly concluded that MFS and Scott were not "de facto" investment advisers owing a fiduciary duty to the shareholders of the Fund.

3. Control

The district court also properly concluded that MFS and Scott cannot be held liable for breach of fiduciary duty under the ICA on the theory that they "controlled" the independent trustees.

The ICA defines "control" as "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company." 15 U.S.C. § 80a-2 (a)(9). MFS and Scott could not have been "control persons "under the ICA, however, because the independent trustees do not fall within the definition of "controlled persons" under the ICA. "A natural person shall be presumed not to be a controlled person within the meaning of this subchapter." 15 U.S.C. § 80a-2(a)(9). This presumption can only be overcome by "a determination to the contrary made by the Commission." Id. No such determination has been made by the SEC here. MFS and Scott cannot be held liable for breach of fiduciary duty under a theory of control.

We hold that the district court properly dismissed appellants' claims against MFS and Scott for breach of fiduciary duty under the ICA.[4]

---

[4] Because of our disposition of this issue, we do not decide the alternate argument advanced by MFS and Scott --

C. Dismissal of Delaware claims against MFS and Scott

Appellants also contend that the district court erroneously dismissed its claims against MFS and Scott for breach of fiduciary duty under Delaware common law. The district court addressed two theories in dismissing appellants' claims against MFS and Scott for breach of fiduciary duty under Delaware law.

1. Fiduciary Duty

As discussed above, neither MFS nor Scott owed a fiduciary duty to the Fund when the independent trustees decided not to renew NMI's contract to provide investment advisory services. Appellants cite no authority for the proposition that a third party with no contractual or legal relationship to the Fund can become subject to a fiduciary duty merely because it provided information about its services to the independent trustees. Delaware law is to the contrary. *See Gilbert v. El Paso Co.* 490 A.2d 1050, 1056 (Del. Ch. 1984) ("State law claims of ... breach of fiduciary relationship must subsist on the actuality of a specific legal relationship, not in its potential.").

The district court properly determined that because neither MFS nor Scott owed a fiduciary duty to the shareholders of the Fund when the independent trustees decided not to renew NMI's contract, neither can be liable for breach of fiduciary duty under Delaware law.

---

namely, whether the ICA provides a private right of action.

2. Control

The district court also correctly held that neither MFS nor Scott "controlled" the independent trustees under Delaware law. *See Harriman v. E.I. DuPont De Nemours & Co.*, 372 F. Supp. 101, 106 (D. Del. 1974) ("it is only when a person affirmatively undertakes to dictate the destiny of the corporation that he assumes such a fiduciary duty"); *Gilbert*, 490 A.2d at 1055 (outsiders do not become fiduciaries simply because they have a "superior bargaining position "with management; there must be "domination ... through actual exercise of direction over corporate conduct").

Here, appellants failed to offer -- and do not offer on appeal -- any facts to establish that MFS and Scott affirmatively dictated the destiny of the Fund or dominated through actual exercise of direction over the independent trustees.

We hold that the district court properly dismissed appellants' claims against MFS and Scott for breach of fiduciary duty under Delaware common law.[5]

D. Dismissal of waste and interference with prospective economic advantage claims against MFS and Scott

---

[5] Because we hold that the district court properly dismissed appellants' state law claims, w do not determine whether the ICA preempts these claims.

Appellants contend that the district court erroneously dismissed Navellier's claims against MFS and Scott for waste and for intentional interference with prospective economic advantage pursuant to Federal Rule of Civil Procedure 12(b)(6). Appellants' arguments are without merit.

1. Waste

The parties agree that Delaware law is controlling on this issue. Delaware courts have explained that the legal test for waste is "severe." *Glazer v. Zapata Corp.*, 658 A.2d 176, 183 (Del. Ch. 1993). "Directors are guilty of corporate waste, only when they authorize an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *Id.*

We hold that the district court properly dismissed the waste claims asserted against MFS and Scott. Under Delaware law, there is no basis for a waste claim against these parties who were not directors. Moreover, appellants' first amended complaint itself established that a shareholder proxy vote was legally required pursuant to Rule 15a-4 of the ICA, which also shows there could have been no waste.

2. Interference with prospective economic advantage

California recognizes a "competition privilege," which protects one from liability for inducing a third person not to enter into a prospective contractual relation with a business competitor.

The privilege applies where (a) the relation [between the competitor and third person] concerns a matter involved in the competition between the actor and the competitor, and (b) the actor does not employ improper means, and (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and (d) the actor's purpose is at least in part to advance his interest in his competition with the other.

Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners, 52 Cal. App. 4th 867, 880 (1997) (internal quotation marks and citations omitted). *See also Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 902 P.2d 740, 751 (Cal. 1995) (holding that plaintiff who seeks to recover for an alleged interference with prospective economic relations must prove that the defendant "engaged in conduct that was wrongful by some legal measure other than the fact of interference itself."). The competition privilege clearly applies to MFS' and Scotts' actions as alleged in the amended complaint, and nothing about their competitive conduct was wrongful.

We hold that the district court properly dismissed the claims against MFS and Scott for intentional interference with a prospective economic advantage.

E. Dismissal of counterclaims without prejudice

Appellants allege -- in one paragraph without citation to the record or authority -- that the district court abused its discretion in dismissing appellees' indemnity counterclaims without prejudice. Appellants contend that "the jury should have been informed that those claims had not merely vanished

but that Defendants might refile and seek $ 3.5 million in attorneys fees ...."

Appellants' argument is frivolous. The decision to grant a voluntary dismissal under Federal Rule of Civil Procedure 41(a)(2) is addressed to the sound discretion of the district court. *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980). A dismissal without prejudice pursuant to Rule 41(a)(2) leaves the parties where they would have stood had the lawsuit never been brought. *In re Corey*, 892 F.2d 829, 835 (9th Cir. 1989) (citation omitted).

Appellants' bare allegation of error does not demonstrate that the district court abused its discretion in dismissing appellees' indemnity counterclaims without prejudice. *See Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982) (possibility of later suit does not rise to the level of legal prejudice that would allow the court to deny a dismissal without prejudice).

F. Summary judgment on intentional interference with prospective economic advantage claim

Appellants allege that the district court erroneously granted summary judgment on NMI's claim against the independent trustees for intentional interference with prospective economic advantage. The district court correctly held that there were no triable issues of fact as to two essential elements of this claim.

We review de novo the district court's order granting summary judgment. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997). Viewing the evidence in

the light most favorable to appellants, we must determine whether there are genuine issues of material fact and whether the district court properly applied the law. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997).

To state a claim for intentional interference with prospective economic advantage, a plaintiff must prove: (1)" the reasonable probability of a business opportunity," (2) "the intentional interference by defendant with that opportunity," (3) "proximate causation," and (4) "damages, all of which must be considered in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner." *DeBonaventura v. Nationwide Mut. Ins. Co.*, 419 A.2d 942, 947 (Del. Ch. 1980) (internal citations omitted). *See also Crosstalk Prods., Inc., v. Jacobson*, 65 Cal. App. 4th 631, 646 (1998) (stating elements of tort of intentional interference with prospective economic advantage under California law).

First, appellants failed to present evidence demonstrating a reasonable probability that NMI would continue as the investment adviser to the Fund. Appellants point to no evidence in the record which, when viewed in a light most favorable to their position, demonstrates that NMI had a reasonable expectation of continuing as the Fund's investment adviser. Rather, appellants simply assert that "a Board that was acting with proper motives" would have renewed NMI's contract. This is not, however, evidence of a "reasonable" expectation of a continuing business relationship. The district court properly concluded that NMI did not have a reasonable expectation of continuing as the

Fund's investment adviser.[6]

Appellants also failed to point to evidence demonstrating damages. As the district court noted, "the claim must still fail because the damages flowing from defendants' interference with this prospective business relationship are too speculative. 'It is black-letter law that damages which are speculative, remote, imaginary, contingent or merely possible cannot serve as a legal basis for recovery.'" (Quoting *Mozzetti v. City of Brisbane*, 67 Cal. App. 3d 565, 577, 136 Cal. Rptr. 751 (1977)).

Because appellants failed to present evidence demonstrating that NMI had a reasonable expectation of continuing as the Fund's investment adviser and did not establish actual damages, we hold that the district court properly granted summary judgment on NMI's claim for intentional interference with prospective economic advantage.

G. Summary judgment on Sletten's counterclaims

On cross-appeal, Sletten contends that the district court erroneously granted summary judgment on the breach of contract counterclaims that he asserted against Navellier and NMI. We disagree.

---

[6] Moreover, so long as the independent trustees were exercising a reasonable business judgment, which was decided by the jury, the independent trustees would be entitled to decline to extend the relationship with NMI. For this reason as well, the claim of interference fails.

Before returning the Fund to Navellier, Sletten and the independent trustees executed the following release:

> In consideration of the covenants, promises and agreements contained herein, Donald Simon, Kenneth Sletten and Lawrence Bianchi (collectively "Trustees") ... release and fully discharge Louis Navellier, Navellier Management, Inc., and their predecessors, successors and related entities ... from all rights, claims and causes of action of any kind or any nature whatsoever, known or unknown, in law or at equity, which the Trustees have or may have against them except for any claim for contribution or indemnity in the event that any third party asserts claims and recovers against the Trustees.

Sletten concedes that, if valid and enforceable, this release bars his counterclaims. Sletten contends, however, that there are genuine issues of fact as to whether the release is unenforceable on grounds of unconscionability or duress.

1. Unconscionability

Under California law,[7] a court may refuse to enforce a facially valid contract that is unconscionable. *See Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 173-74,

---

[7] The release was executed in California and includes waiver language referring to California Civil Code section 1542. As a result, we look to California law to determine its validity. *See Kaufman & Broad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468, 1473-74 (N.D. Cal. 1993).

171 Cal. Rptr. 604 (Cal. 1981). Unconscionability has both a "procedural" and a" substantive" aspect. The procedural aspect is manifested by (1)" oppression," which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or (2) "surprise," which occurs when the supposedly agreed-upon terms are hidden in a document. *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114 (1982). Substantive unconscionability, on the other hand, refers to an overly harsh allocation of risks or costs which is not justified by the circumstances under which the contract was made. *Id.* at 487; *see also Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1532 (1997) (substantive unconscionability is indicated by contract terms so one-sided as to "shock the conscience"). Both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable. *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 83 (1991).

Here, the record indicates that there are no genuine issues of material fact indicating that the challenged release was either procedurally or substantively unconscionable. As the district court noted, Sletten freely chose to waive his legal rights in order to preserve the stability of the Fund, he was well-represented by counsel, and he had adequate time to pursue other alternatives. And, as the district court properly found, the release "is also not unconscionable because it was 'one-sided, 'nor does it shock the conscience."

2. Duress

A release may be invalidated on the ground of economic duress when a party is subject to a wrongful act such as a threat and must succumb to the wrongdoers or face

financial ruin. *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 469 (9th Cir. 1987). The wrongful act must be "'sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure.'" *Id.* (quoting *Rich & Whillock, Inc. v. Ashton Dev., Inc.*, 157 Cal. App. 3d 1154, 1158, 204 Cal. Rptr. 86 (1984)).

There are no genuine issues of material fact indicating that the challenged release was procured though economic duress. Sletten had more than one alternative to signing the release and accepting NMI's return as investment adviser. Sletten might have hired a company named Neuberger and Berman as investment adviser, liquidated the Fund, appointed a receiver, or found another investment adviser. While Sletten may have found these choices unattractive, the district court properly found that "there was no economic duress, as none of these choices would have caused Sletten ... to face economic ruin."

Because there were no material issues of fact as to the validity or enforceability of the release, we hold that the district court properly granted summary judgment on Sletten's counterclaims.

H. Class certification

Appellants contend that the district court abused its discretion by denying class certification pursuant to Federal Rule of Civil Procedure 23(b)(3). We review the denial of class certification for abuse of discretion, *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), and must determine whether the district court applied the

proper legal criteria. "While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23." *Id.*

The district court gave five grounds for denying class certification pursuant to Rule 23(b)(3), each of which sustains the denial. The district court held that: (1) individual questions predominate over common questions; (2) intra-class conflicts preclude certification; (3) Kornhauser, as class counsel, "cannot adequately represent the class;" (4) Navellier was neither a typical nor adequate class representative and was subject to unique defenses; and (5) the remaining class members were not appropriate class representatives.

Appellants' challenge to the district court's denial of class certification is supported by virtually no citations to authority and no citations to the record. For example, as to three of the district court's independent grounds justifying denial of certification, appellants simply argue: "There are no intra or interclass conflicts, there are no unique defenses as to Mr. Navellier which would preclude him or any of the other Plaintiffs from acting as class representatives." These bald assertions do not establish that the district court abused its discretion in denying class certification.

The district court correctly applied Rule 23 and each ground advanced is independently sufficient to support the denial of certification. *See, e.g., Valentino v. Carter-Wallace*, 97 F.3d 1227, 1230 (9th Cir. 1996) (failure to show predominance of individual questions); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (9th Cir. 1997) (intra-class conflicts); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) (class counsel's inadequacy); *Moore v. Hughes*

Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (inadequate class representative).

We hold that the district court did not abuse its discretion in denying class certification.

II. Trial Management

A. Time limitations

Appellants contend that the district court's imposition of a time limit within which to present their case "was prejudicial and deprived them of due process." This argument is without merit.

We review such challenges to trial court management for abuse of discretion. *Amarel v. Connell*, 102 F.3d 1494, 1513 (9th Cir. 1997). Trial courts have broad authority to impose reasonable time limits. *Id.* Such limits are useful to "prevent undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* (internal quotation marks and citation omitted). While trial courts have discretion to expedite the completion of trials, "they must not adhere so rigidly to time limits as to sacrifice justice in the name of efficiency." *Gen. Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1509 (9th Cir. 1995).

The district court exercised a normal role in establishing time limits at trial and did not abuse its discretion. At the pre-trial conference, the court informed the parties that they would have eleven days, to be divided between them, for trial. Appellants insisted they needed at

least ten to twelve days to present their case.[8] In response, the district court extended the time allotted for trial to fourteen days, giving appellants eight days and appellees six days. These pretrial limits were adjusted during trial and appellants ultimately received a total of eleven days within which to present their case -- an amount entirely consistent with appellants' original request.

The time limits imposed here were reasonably based on the parties' estimates and were adjusted as appropriate during trial. *Amarel*, 102 F.3d at 1513. The district court appears to have been fair and balanced in allocating the reasonably available time to all parties. There was no abuse of the broad discretion that the district court had to manage the trial.

B. Evidentiary rulings

Appellants challenge evidentiary rulings made by the district court throughout the trial. We review the district court's evidentiary rulings for abuse of discretion and" will not reverse in such a case, unless the ruling is manifestly erroneous." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997) (internal quotation

---

[8] At the pretrial conference, the court acknowledged that appellants originally claimed to need twenty-five days. However, this estimate was made before the court ruled on the cross-motions for summary judgment. The grant of partial summary judgment eliminated NMI's interference claim as well as Sletten's contract-based counterclaims. The dismissal of these claims streamlined the issues and eliminated the need for expert testimony

marks and citation omitted).

None of these challenges has merit and none requires our detailed discussion. As to each of the challenged rulings, appellants do not demonstrate that the district court's action was "manifestly erroneous." *Id.* We hold that the district court did not abuse its discretion in making the challenged evidentiary rulings.

C. Comment on accusations of perjury

Appellants argue that the district court improperly influenced the jury by accusing Navellier of perjury. This argument is without merit.

During cross-examination, Navellier claimed that the independent trustees had perjured themselves at trial by testifying to the substance of a conference call between Navellier and the independent trustees. In response to this accusation, the court admonished Navellier: "All right. This is enough. That's a very, very serious charge that he's made under oath, and it could be perjurious. This could be a criminal proceeding." Appellants' counsel objected, and the court then immediately instructed the jury to disregard his prior comment:

All right. I think his objection is good, ladies and gentlemen of the jury, and the jury will disregard that statement of the court.

And I will, again, admonish you that nothing that the court says or does during the course of this trial should be taken in any way as indicating how your verdict should come out.

You, and you alone, are the sole judges of the facts in this case, and it's your judgment that counts on the facts, it's not the court's.

Trial courts have broad discretion to comment upon the evidence, including the credibility of a witness. *See Quercia v. United States*, 289 U.S. 466, 469, 77 L. Ed. 1321, 53 S. Ct. 698 (1933) (noting that in a jury trial in federal court, judge may "express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination") (citations omitted). The essential question is whether the court made clear to the jury that all matters of fact are for its determination. *Id.; see also United States v. James*, 576 F.2d 223, 228 (9th Cir. 1978) (affirming conviction where court commented that the elements of the offense had been established, but also instructed the jury that it was the final arbiter of questions of fact).

We hold that the court here did not abuse its discretion by commenting on Navellier's testimony. The court did not distort the evidence and the court's comment was not so one-sided as to amount to an abuse of discretion. *See Quercia*, 289 U.S. at 469. Further, even if the comment could be considered prejudicial, any prejudice was cured by the court's contemporaneous curative instruction and the final jury instructions, which stressed that the jurors were the sole judge of the facts. *Cf. Maheu v. Hughes Tool Co.*, 569 F.2d 459, 472 (9th Cir. 1978).

D. Imposition of sanctions against Sletten

On cross-appeal, Sletten argues that the district court

abused its discretion in affirming the special master's imposition of sanctions against Sletten and his counsel for "abusive and oppressive" discovery requests. Sletten contends that the sanctions violated his right to due process because he and his counsel were not given notice or opportunity to be heard before the special master imposed sanctions. We agree.

We review the imposition of sanctions for abuse of discretion. *Primus Auto. Fin. Servs. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). When a court imposes sanctions sua sponte, the general rule is that it must first issue an order to show cause why sanctions should not be imposed to give the lawyer or party an opportunity to explain his or her conduct. *See, e.g., Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 836 (9th Cir. 1987) (district court abused its discretion where "no notice was given of the court's intention to impose sanctions and no opportunity was offered to explain the allegedly improper filings"); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 523 (9th Cir. 1983) (district court abused its discretion where it "did not provide the attorneys with an opportunity to show cause to the contrary before imposing the sanctions").

Here, Sletten and his counsel first received notice of the sanctions when they received a copy of the special master's order imposing sanctions. This order was summarily approved by the district court. The special master abused its discretion by failing to give Sletten and his counsel notice of his intent to impose sanctions before imposing sanctions. *Miranda*, 710 F.2d at 522-23. The further review by the district court that affirmed the sanctions provided no procedural relief. We therefore vacate the judgment of sanctions and remand to the district court with instructions

that it provide an appropriate procedure to afford Sletten and his counsel an opportunity to present a defense and explain why they should not be sanctioned. In so holding, we express no view on the merits whether sanctions may be sustainable after proper notice and opportunity to be heard.

III. Jury Instructions

Appellants contend that two of the instructions given to the jury were erroneous. The standard of review on appeal for an alleged error in jury instructions depends on the nature of the claimed error. *Oglesby v. S. Pac. Transp. Co.*, 6 F.3d 603, 606 (9th Cir. 1993). If jury instructions are challenged as a mis-statement of the law, we review the challenged instructions de novo. *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998). Otherwise, we afford a district court" substantial latitude in tailoring jury instructions, [and] we review the formulation of those instructions for abuse of discretion." *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999).

A. ICA instruction

Appellants argue that the district court "committed prejudicial error" by refusing to instruct the jury that, absent an emergency or unforseen event, section 15 of the ICA requires prior shareholder approval before an investment adviser may be replaced.[9] We disagree with appellants'

---

[9] As a preliminary matter, appellees argue that appellants are precluded from raising this issue on appeal. Specifically, appellees contend that "appellants did not object when the Court declined to give the proposed instruction and did not object when

construction of the ICA and we hold that the district court properly refused to give appellants' requested instruction.

Section 15(a) of the ICA makes it unlawful to serve as an investment adviser except under a contract approved by the shareholders. *See* 15 U.S.C. § 80a-15(a). Recognizing that an unavoidable lapse of time may occur between the end of one contract and the date on which a new contract is approved by a majority of shareholders, the SEC promulgated Rule 15a-4, which provides in pertinent part:

> Notwithstanding section 15(a) of the Act, a person may act as investment adviser for [a fund] pursuant to a written contract which has not been approved by a majority of the outstanding voting securities of such company during the one hundred and twenty day period after the termination of an investment advisory contract by an event (other than an assignment by an investment adviser in connection with which such investment adviser, or a controlling person thereof, directly or indirectly receives money or other benefit) described in paragraphs (3) or (4) of section 15(a) of the Act or by the failure to renew such contract ....

---

the Court finished instructing the jury and gave the parties another opportunity to object. "We assume, without deciding, that appellants properly preserved this issue for appeal.

17 C.F.R. § 270.15a-4.[10] Under the plain language of Rule 15a-4, this exemption is not limited to unforeseeable non-renewals or terminations. As amicus curiae, the SEC explains:

> The availability of [Rule 15a-4] is not conditioned on a finding that either of the first two events -- the non-renewal or termination of an advisory contract by the fund -- was unforeseeable. Rather, under the rule's plain language, the only conditions are that: the interim contract may not last more than 120 days; it must be approved by the directors, including a majority of the independent directors; and the compensation under the contract may not exceed what would have been paid under the most recent contract that was approved by the shareholders.

See § 17 C.F.R. 270.15a-4(a) and (b).

Appellants argue that appellees' "reliance on Rule 15a-4 as legal grounds for their actions is legally wrong.... Rule 15a-4 is an SEC rule and is not necessarily the law if it does not carry out the intent of the statute (§ 15(a) of the '40 Act)." We disagree with appellants' analysis. As we see it, Rule 15a-4 is fully consistent with Congressional intent, and indeed is reasonably necessary to implement the purposes of the ICA. We see no reason here not to defer to the sensible

---

[10] This regulation has since been amended, but we quote the version that governs this case.

and informed judgment of the SEC, the agency charged with administering the statute.

Section 6(c) of the ICA grants the SEC broad authority to exempt certain actions from the requirements of the ICA. Section 6(c) of the ICA provides:

> The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person ... or transaction, or any class or classes of persons ... or transactions, from any provisions ... of this sub-chapter or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

15 U.S.C. § 80a-6(c). The authorization to exempt any person or transaction from the provisions of the ICA when" necessary or appropriate in the public interest and consistent with the protection of investors" reflects the Congressional intent to entrust certain policy decisions to the SEC.

In determining the appropriate scope of the exemption embodied by Rule 15a-4, the SEC was required to balance two important investor protections in Section 15(a). On the one hand, the shareholder approval requirement ensures that fund investors have the authority to decide whether a particular investment adviser is retained by the fund. On the

other hand, granting the trustees the authority to terminate or not renew an existing contract gives them critical oversight. Deciding how to reconcile these provisions when their policies conflict is precisely the sort of judgment entrusted to the SEC by Congress.

Appellants do not demonstrate that the SEC's promulgation of Rule 15a-4 is inconsistent "with the protection of investors or the purposes fairly intended by the policy and provisions" of the ICA. *See* 15 U.S.C. § 80a-6(c). While Rule 15a-4 permits a brief postponement of the shareholders' right to vote on an advisory contract, it includes additional investor safeguards, such as the requirement that a majority of the independent trustees approve the interim contract and compensation limitations for the interim period.[11]

Also, the SEC's reasonable interpretation of a statute that it administers, including its promulgation of rules and regulations interpreting or implementing the statute, is entitled to deference. *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). An agency's interpretation of one of its own rules, including an interpretation expressed in an amicus brief, is controlling unless plainly erroneous or inconsistent with the rule. *Auer v.*

---

[11] Further, contrary to appellants' claim, the independent trustees do not have unbridled discretion for 120 days. In deciding whether to enter into an interim contract, just as in deciding whether to renew or terminate an existing contract, the independent trustees must satisfy their duties as fiduciaries of the fund. These duties are enforceable under the ICA, and include the obligation to inform themselves of material facts and exercise their judgment for the benefit of the fund. *See* 15 U.S.C. § 80a-15(c).

Robbins, 519 U.S. 452, 461-63, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997). Appellants have not demonstrated that the SEC's interpretation of Rule 15a-4 is plainly erroneous or inconsistent with that rule. To the contrary, we view Rule 15a-4 as a sensible and necessary provision that bridges a potential gap or conflict in the ICA.

Because appellants' proposed jury instruction is contrary to the plain language of Rule 15a-4, we hold that the district court properly refused to give the proposed instruction.

B. Business judgment rule instruction

Appellants advance two arguments in support of their contention that the district court erroneously instructed the jury on the business judgment rule.[12] First, appellants contend

---

[12] The business judgment rule is a presumption that in making a business decision the directors of a corporation "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (internal quotation marks and citation omitted). The presumption, however, attaches only to the decisions of directors who are fully independent and wholly disinterested. When the business judgment rule applies, it insulates directors from liability, and imposes upon the party challenging the decision the burden of rebutting the presumption. *Id.* "A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be attributed to any rational business purpose." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (internal quotation marks and citation omitted).

that the duty of care jury instructions imposed a "subjective" rather than an "objective" test for assessing whether the independent trustees acted properly in terminating NMI. Second, appellants maintain that the district court erroneously instructed that, to rebut the presumption of good faith, appellants were required to prove that bad faith "was the sole or primary motivating factor" for the trustees' decision.

As to the independent trustees' duty of care, the court instructed:

> [A] trustee, to fulfill the requisite duty of care under the business judgment rule must,
>
> One: Not have an undisclosed personal financial interest in the transaction that is the subject of the trustee's business judgment.
>
> Two: Be informed about the subject of the business judgment to the extent that the trustee reasonably believes to be appropriate under the circumstances, and such belief must be rational.
>
> And Three: Rationally believe that the trustee's business judgment is in the best interest of the corporation.
>
> The Plaintiff, who is challenging the conduct of the trustees of a mutual fund, must prove that the trustees did not exercise the proper

> business judgment. And, consequently, you must find that defendants fulfilled their duty of care unless plaintiff proves
>
> (a) that the defendants have an undisclosed personal financial interest in the transaction that is the subject of their business judgment, or
>
> (b) that defendants were not informed about the subject of the business judgment to the extent that they reasonably believed to be appropriate under the circumstances, or
>
> (c) that they did not rationally believe that such business judgment was in the best interest of the corporation, or
>
> (d) that no business judgment was, in fact, exercised.
>
> (Emphasis added to challenged portion of instruction).

The duty of care instruction given here properly stated controlling Delaware law. In *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), the Delaware Supreme Court addressed the precise language challenged here:

> Compare the American Law Institute test, which requires that a director must be "informed ... to the extent the director

> reasonably believes to be appropriate under the circumstances." Because this test also is based on the objective test of reasonableness, it could be argued that it is essentially synonymous with the Delaware test.... In the end, the debate may be mostly semantic.

Id. at 259 n.47 (internal citations omitted) (emphasis added). Thus, Delaware courts have rejected appellants' contention that the duty of care instruction given here erroneously created a subjective -- rather than objective -- test. Even if there are "semantic" differences between Delaware law and the instruction given here, the district court did not err in giving an instruction that "is essentially synonymous with the Delaware test." *Id.*

Appellants next contend that the district court erroneously instructed that they were required to prove that bad faith "was the sole or primary motivating factor" for the independent trustees' decision.

The district court's instruction here complied with Delaware law. In *In re Anderson*, Clayton Shareholders Litigation, 519 A.2d 680, 688 (Del. Ch. 1986), the court held that to overcome the protection afforded directors by the business judgment rule, plaintiffs must point to facts indicating that "the board's action [was] motivated solely or principally
for the impermissible purpose of retaining office for personal reasons and not for reasons relating to the corporations's welfare." *Id.* (citing *Bennett v. Propp*, 41 Del. Ch. 14, 187 A.2d 405 (Del. 1962)) (emphasis added). And in *Pogostin v. Rice*, 480 A.2d 619, 627 (Del. 1984), overruled on other

grounds by *Brehm*, 746 A.2d at 253, the Delaware Supreme Court stated that: "It is the plaintiff's burden to allege with particularity that the improper motive in a given set of circumstances, i.e., perpetuation of self in office or otherwise in control, was the sole or primary purpose of the wrongdoer's conduct." (Emphasis added.). *See also Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548, 554 (Del. 1964); *Mesa Petroleum*, 493 A.2d at 954.

We hold that the business judgment rule instructions given by the district court here properly stated controlling Delaware law.

C. Federal Rule of Civil Procedure 37(b)(2) sanction

Appellants contend that the district court erred when, as a sanction for discovery abuse, it instructed the jury that Navellier had breached his duty to procure liability insurance for the Fund. We review the imposition of discovery sanctions for abuse of discretion. *The Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997).

"Rule 37(b)(2) contains two standards -- one general and one specific -- that limit a district court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Ins. Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982). Sanctions may be warranted under Federal Rule of Civil Procedure 37(b)(2) for failure to obey a discovery order as long as the established issue bears a reasonable relationship to the subject

of discovery that was frustrated by sanctionable conduct. *Id.* at 707-09.

Here, the district court found that Kornhauser, as counsel for Navellier and NMI, willfully refused to answer questions at his deposition concerning the circumstances under which insurance was procured for the Fund -- even after the special master ordered Kornhauser to answer the questions. This conduct warranted sanction, and we cannot say that the sanction imposed was not commensurate with the offensive conduct. We hold that appellants have failed to demonstrate that the district court abused its discretion in issuing the sanction.

IV. Post-Trial Rulings

A. Motions for judgment as a matter of law and new trial

Appellants argue that the district court erroneously denied their motions for judgment as a matter of law and for new trial. This court reviews de novo the denial of a motion for judgment as a matter of law. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1268 (9th Cir. 1996). A district court's denial of a motion for new trial is reviewed for abuse of discretion. *Desrosiers v. Flight Int'l of Florida, Inc.*, 156 F.3d 952, 957 (9th Cir. 1998).

Appellants erroneously contend that the district court denied their motions on the grounds that they were" untimely." But that is not what the court did. The district court denied appellants' self-styled "renewed" motions for

judgment as a matter of law and new trial because appellants in fact had failed to make such motions at the close of evidence. There was nothing that could be renewed following the entry of judgment.

Federal Rule of Civil Procedure 50(b) provides, in pertinent part:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59.

(Emphasis added.). We have held that "failure to comply with Rule 50(b) precludes a challenge to the sufficiency of the evidence on appeal and that the requirement that the motion be made at the close of all the evidence is to be strictly observed." *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996) (internal quotation marks and citations omitted).

The district court properly denied the motions for judgment as a matter of law and new trial. *See id.* at 879.

B. Motion to amend the complaint

Appellants argue that the district court "committed

reversible error" in denying their motion to amend the complaint to conform to the evidence.

We need not consider this argument because appellants have waived their challenge to this issue on appeal.[13] *See* Fed. R. App. P. 28(a)(9) (appellants' brief must contain" appellants' contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). *See also Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (issues raised in the appellate brief, but not supported by argument, are deemed abandoned); *United States v. Loya*, 807 F.2d 1483, 1486-87 (9th Cir. 1987) (same). Appellants' failure to provide citations to supportive documents in the record on appeal precludes this argument.

CONCLUSION

We will not disturb the jury's verdict and we affirm the judgment of the district court challenged by appellants. We further hold for Kenneth Sletten on the cross appeal that the district court erred in affirming the special master's imposition of sanctions against Sletten and his counsel. We vacate the imposition of sanctions and remand with

---

[13] Further, appellants failed to include the district court's denial of this motion in their excerpts of record or supplemental excerpts of record. See Fed. R. App. P. 10(b)(2) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.").

instructions to afford Sletten and his counsel an opportunity to present a defense and explain why they should not be sanctioned. Appellees are entitled to their costs on appeal.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C-97-1258 WHO

[Filed July 23, 1998]

ROSEMARY J. McLACHLAN, Trustee of the Mary Butschek Living Trust, et al.,

Plaintiffs,

vs.

DONALD SIMON, an individual and former Trustee of The Navellier Series Fund, et al.,

Defendants.

JUDGES:
William H. Orrick, United States District Judge.

OPINION AND ORDER

Plaintiffs in this case are shareholders and former shareholders of the Navellier Series Fund ("Fund"), Louis G. Navellier, an individual and Trustee and Shareholder of the Navellier Series Fund on his own behalf as a Trustee on behalf of The Navellier Series Fund and as a class representative ("Navellier"), and Navellier Management, Inc ("NMI"). They brought this action against defendants Donald Simon ("Simon"), Kenneth Sletten ("Sletten"), and Lawrence Bianchi ("Bianchi"), who are Independent Trustees of the Navellier Series Fund (collectively "Independent Trustees"), Roy Adams (Adams"), the Independent Trustees' attorney, and Massachusetts Financial Services ("MFS") for, among other things, breach of fiduciary duty. Defendants now move to dismiss the action for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Independent Trustees' motion is denied, and the MFS's and Adams' motions are granted with prejudice.

I.

On May 15, 1993, Navellier and NMI caused the Fund to be organized as a Delaware business trust to engage in the business of investing assets in an open-end investment company (a mutual fund). Navellier and Jack Drinkwater ("Drinkwater") were elected as Interested Trustees, while Simon, Sletten, and Bianchi were elected as Independent Trustees.[1] On that same day, the Fund entered into an

---

[1] Boards of directors are composed of "interested" and "noninterested," or "independent," persons. An "interested" person

investment advisory agreement with NMI.

In July 1995, Drinkwater was terminated from his employment with NMI, and resigned as an Interested Trustee of the Fund. He was replaced by Alan Alpers as an Interested Trustee.

On April 26, 1996, Navellier made a motion to merge the Fund into The Navellier Performance Funds. This would have terminated the Independent Trustees' positions. The Independent Trustees rejected Navellier's proposal.

Between May and November 1996, the Independent Trustees requested certain information from Navellier as part of their reconsideration of his merger proposal. After Navellier refused to provide the information, it was suggested that the issue of a merger be presented to the shareholders by way of a proxy. On November 11, 1996, the Independent Trustees voted to have NMI prepare and file a proxy statement with the Securities and Exchange Commission

---

is defined by statute in 15 U.S.C. §§ 80a-2(a)(19) and 80a-2(a)(3), generally to mean any person having a direct or indirect simple interest in an investment company. No registered investment company shall have a board of directors more than sixty percent of the members of which are persons who are interested persons of such registered company. 15 U.S.C. § 80a-10(a). Inasmuch as the Fund is organized under Delaware law as a business trust, members of its Board of Directors are herein called "Trustees." The Fund has five Trustees, two of whom are "Interested Persons" (herein "Interested Trustees"). The remaining three are not "Interested Persons" and are herein called "Independent Trustees." *Id.*

("SEC").

In early 1997, the Independent Trustees reviewed NMI's proxy filing. On March 13, 1997, a Board of Directors ("Board") meeting was held, which was attended by all of the Trustees. At this meeting, the Fund's Independent Trustees voted not to renew NMI's contract, which was set to expire by its terms on March 15, 1997. The Independent Trustees also voted to hire MFS as the Fund's investment advisor.

Plaintiffs filed a complaint on April 10, 1997 seeking to enjoin defendants, as Trustees (and counsel) of the Fund, from removing Navellier as an Interested Trustee. Between April 1997 and June 1997, plaintiffs brought a series of motions for injunctive relief that attempted to block the Independent Trustees' efforts to obtain ratification of their investment advisory agreement with MFS and to enable NMI to regain control of the Fund.

On May 23, 1997, a majority of shareholders voted for MFS to continue as investment advisor to the Fund. The required two-thirds of the shareholders, however, did not vote to support MFS.[2] MFS was, then, rejected as the Fund manager by default. The results were not announced until June 1997. On July 14, 1997, defendants returned management of the Fund to NMI, and were forced to resign.

On February 2, 1998, the parties filed an amended complaint, which added other Independent Trustees of the Fund and their lawyer, as well as MFS, as defendants, and

---

[2] 15 U.S.C. §§ 80a-2(a)(42)(A), 80a-15(a).

two different classes of plaintiff shareholders. Class A plaintiffs are those who were forced to leave the Fund due to the management change and suffered damages, and Class B plaintiffs are those who remained in the Fund and suffered damages due to the management change. The only damages alleged for these classes are capital gains taxes. The causes of action within the amended complaint are for (1) breach of fiduciary duty under 15 U.S.C. § 80a-35(a) against the Independent Trustees, Scott and MFS (first and fifth causes of action); (2) common law breach of fiduciary duty under Delaware law against the Independent Trustees, Scott and MFS (second and sixth cause of action); (3) common law breach of fiduciary duty under California law against Adams (third and seventh cause of action); (4) negligence against Adams (fourth and eighth causes of action); (5) corporate waste against all defendants (ninth cause of action); and (6) interference with prospective economic relations against all defendants (tenth cause of action).

II.

A.

1.

The Independent Trustees, MFS and Scott[3] first argue that the federal claims should be dismissed because there is no implied private right of action under § 36 of the Investment Company Act of 1940 ("ICA") as codified in 15 U.S.C. §

---

[3] Adams also joins in both of the motions by the other defendants.

80a-35(a).[4] Plaintiffs, they claim, lack standing to bring suit under this statute. Because Congress intended shareholders to have a right of action under ICA § 36(a), the Court finds an implied private right of action.

In determining whether to infer a private right of action from a federal statute, the focus of the Court's inquiry is Congressional intent. *Thompson v. Thompson*, 484 U.S. 174, 179, 98 L. Ed. 2d 512, 108 S. Ct. 513 (1988). As guides to discerning that intent, the Supreme Court often has relied on the four-factor test set forth in Cort v. Ash, along with other tools of statutory construction. *Id.*

First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the

---

[4] Section 80a-35(a)(1) of the ICA provides:

> The Commission is authorized to bring an action in the proper district court of the United States . . . alleging that a person serving or acting in one or more of the following capacities has engaged . . . in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts --
>
> (1) as officer, director, member of any advisory board, investment advisor, or depositor . . . .

statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the-cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975) (internal quotation marks and citations omitted). The four factors are not, however, entitled to equal weight; the central inquiry remains the intent of Congress. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979).

The Court first looks to the language of the statute itself, then to the legislative history. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16-17, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979). The absence of anything in the legislative history that indicates an intent to confer a private right of action is not dispositive. *Id.* at 18. The failure of Congress expressly to consider a private right of action "is not inevitably inconsistent with an intent on its part to make such a remedy available." *Id.* Rather, "such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.* "The intent of Congress remains the ultimate issue, however, and 'unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" *Thompson*, 484 U.S. at 179 (quoting

Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 94, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981)).

The question of what remedies are available under a statute that provides a private right of action is analytically distinct from the issue of whether such a right exists in the first place. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 66, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992). Once the Court has found that Congress intended to create a private right of action, however, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66.

The language of § 36 only expressly allows the SEC to bring suit. Despite that clear language, four Courts of Appeals have found an implied private right of action.[5] Lest there be any doubt concerning the private right of action, Congress, in 1980, amended the ICA in the Small Business

---

[5] *See, e.g., Brown v. Bullock*, 294 F.2d 415, 418 (2d Cir. 1961); *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1968), *cert. denied*, 394 U.S. 928, 22 L. Ed. 2d 459, 89 S. Ct. 1194 (1969); *Levitt v. Johnson*, 334 F.2d 815, 819 (1st Cir. 1964), *cert. denied*, 379 U.S. 961, 13 L. Ed. 2d 556, 85 S. Ct. 649 (1965), *Bancroft Convertible Fund, Inc. v. Zico Inv. Holdings, Inc.*, 825 F.2d 731, 735 (3d Cir. 1987). Only the Eighth Circuit refused to imply a private cause of action, but that holding was thrown into doubt by a later decision of that Circuit. *See Brouk v. Managed Funds, Inc.*, 286 F.2d 901, 912 (8th Cir. 1961), *cert. denied*, 366 U.S. 958, 6 L. Ed. 2d 1252, 81 S. Ct. 1921 (1961), vacated as moot per curiam, 369 U.S. 424, 82 S. Ct. 878, 8 L. Ed. 2d 6 (1962), later questioned in *Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 793 (8th Cir. 1967).

Investment Incentive Act, and evidenced a clear intent for courts to imply a private cause of action in § 36. The House Report on Public Law No. 96-477 states that "breaches of fiduciary duty involving personal misconduct should be remedied under Section 36(a) of the Investment Company Act . . . . the Committee contemplates suits by shareholders as well as by the Commission, since these are the persons the provision is designed to protect . . . ." *Bancroft Convertible Fund*, 825 F.2d 731 at 736 (quoting H.R. Rep. No. 1341, 96th Cong., 2d Sess. 28-29 (1980), reprinted in 1980 U.S.C.C.A.N. 4800, 4810-11).

Thus, Congress clearly intended for § 36 to provide a private right of action to shareholders suing board members and investment advisors for breach of fiduciary duty, and the Court finds a private cause of action exists under § 80a-35(a). The motions of the Independent Trustees and Scott and MFS to dismiss the first and fifth causes of action are denied on this ground.

2.

The Independent Trustees, Scott and MFS next contend that plaintiffs cannot state a cause of action under § 80a-35(a) for breach of fiduciary duty because the Business Judgment Rule ("BJR") protects defendants. Plaintiffs, however, have alleged certain facts that, if true, would overcome the BJR presumption.

The BJR "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v.*

Lewis, 473 A.2d 805, 812 (Del. Sup. 1984) (citations omitted). This presumption only attaches to decisions made by directors who are completely independent and wholly disinterested. *Id.* When the BJR applies, it imposes upon the party challenging the decision the burden of rebutting the presumption. *Id.* The BJR applies to the breach of fiduciary standard under § 36 as it does to state causes of action. *Reserve Management Corp. v. Anchor Daily Income Fund, Inc.*, 459 F. Supp. 597, 611 (S.D.N.Y. 1978).

Plaintiffs argue that the BJR presumption does not apply in this case. They contend that the Trustees took defensive measures in the context of a battle for corporate control, which triggers the heightened scrutiny first mandated by the Delaware Supreme Court in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. Sup. 1985).

In Unocal, the Court held that when the BJR is applied to a board adopting a defensive mechanism (in that case a discriminatory self-tender) in response to a takeover threat, the initial burden of showing that the BJR applies falls upon the directors. Id. Furthermore, the Unocal standard applies whether the takeover bid is pending or not. *See, e.g., Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. Sup. 1985).

All of the cases cited by plaintiffs and defendants on this issue, however, deal with defensive mechanisms that were put in place to ward off potential corporate takeovers. That is not the case here. The proposed merger of the Fund with The Navellier Performance Funds, and the possible retaliation for the firing of Drinkwater are not similar to the possibility of a corporate takeover.

In any event, the main concern of courts in such takeover situations is that the directors will frustrate or completely disenfranchise the shareholders' right to vote. *Stroud v. Grace*, 606 A.2d 75, 91 (Del. Sup. 1992). Here, the shareholders did vote on whether to allow MFS to continue as the investment advisor. Thus, the Independent Trustees did not usurp the right of shareholders to vote because a shareholder vote on MFS (and de facto on NMI) was held. The proper BJR standard, then, is the normal presumption, which plaintiffs must overcome.

Plaintiffs have, however, alleged facts that, if true, would overcome the BJR presumption. They allege that the Independent Trustees took actions against Navellier and NMI in retaliation for Navellier's firing of Drinkwater as a trustee, and in order to entrench themselves on the Board. The amended complaint alleges actions by the Independent Trustees that support these allegations. For example, plaintiffs allege that the Independent Trustees were upset by Drinkwater's firing, defeated the merger proposal, failed to renew NMI's contract, ousted Navellier from the Board, demanded privileged personal financial information from Navellier, interfered with the SEC's review of the potential proxy vote on the merger, and had an agreement with MFS to remain as Board members.

For a Rule 12(b)(6) motion to dismiss, the Court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from those allegations. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Thus, the Independent Trustees', Scott and MFS' motions to dismiss the first and fifth causes of action under § 80a-35(a) are denied because plaintiffs have

adequately pled to overcome the presumption of the BJR.

3.

Plaintiffs assert that Scott and MFS breached a fiduciary duty to Fund shareholders by convincing the Trustees not to renew NMI's investment advisory contract. Under the ICA, it is within the Independent Trustees' sole discretion to renew the investment advisor's contract. 15 U.S.C. § 80a-15(c). In fact, at the time the decision was made by the Independent Trustees, Scott and MFS did not even owe a fiduciary duty to the Fund or its shareholders under the ICA. MFS did not become the investment company advisor until after the March 13, 1997 vote, and Scott was not a trustee until April 10, 1997.

Plaintiffs advance several theories under which they argue Scott and MFS are liable under the ICA. The first of these is that MFS and Scott were "de facto" investment advisor and trustee. Plaintiffs point out that MFS drafted the investment advisory agreements and minutes removing NMI for the March 13, 1997 meeting.[6] They assert that NMI was, then, "acting" as the investment advisor at that time. As the "acting" advisor, MFS -- and its representative Scott -- had a fiduciary duty to the Fund's shareholders under the ICA because § 80(a)-35(a) holds persons "serving or acting" in the

---

[6] These facts are not relied on in the amended complaint. In fact, plaintiffs rely on facts, and statutes (§§ 80a-47(a), 80a-2(a)(9)) that are not found in the amended complaint. Because they have no merit, rather than make plaintiffs amend the amended complaint, the Court will deal with them here.

role of investment advisor to such a duty.

Plaintiffs, however, have cited no authority to support their theory of a "de facto" advisor. Indeed, such a theory does not seem to exist in case law.[7] It is also doubtful that "serving or acting" includes the situation in which MFS found itself. MFS could not have acted as the investment advisor until the Independent Trustees voted to accept its contract at the March 13 meeting. Thus, MFS had no fiduciary duty to shareholders stemming from § 80a-35(a), and no authority to renew NMI's contract, at the time the Independent Trustees voted not to renew NMI as the investment advisor.

Plaintiffs also argue that Scott and MFS are liable for breach of fiduciary duty because they procured the Independent Trustees' breach under § 80a-35(a). They rely on § 80a-47(a), which makes it "unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this subchapter . . . ." Plaintiffs contend that Scott and MFS caused the Independent Trustees not to renew NMI's contract because they controlled the Independent Trustees.

---

[7] Plaintiffs have not made a claim for aiding and abetting or conspiracy in any of their breach of fiduciary duty claims. To the extent they attempt to do so with these allegations, such an implied cause of action is not allowed under the ICA. *In re ML-Lee Acquisition Fund II, L.P. Sec. Litig.*, 848 F. Supp. 527, 545-547 (D. Del. 1994); *See also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 179, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994).

The definition of "control" is provided by § 80a-2(a)(9).[8] Under this section, "control means the power to exercise a controlling influence over the management or policies of a company . . . ." Plaintiffs allege that Scott and MFS control the Independent Trustees because they offered to keep them on as Independent Trustees, and offered them insurance.

Plaintiffs, however, neglected to read the remainder of § 80a-2(a)(9). The statute is concerned with control through stock ownership.[9] It specifically states that any person who

---

[8] Section 80a-2(a)(9) states in relevant part:

"Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company. A natural person shall be presumed not to be a controlled person within the meaning of this subchapter. Any such presumption may be rebutted by evidence, but except as hereinafter provided, shall continue until a determination to the contrary made by the Commission by order either on its own motion or on application by an interested person. . . .

[9] The cases cited by plaintiffs for support also show that "control" is solely a matter of voting shares owned. *See, e.g.*,

does not own more than twenty-five percent of the voting shares of the company is presumed not to control the company. Furthermore, there is a presumption that natural persons, which the Independent Trustees are, are not controlled persons. Finally, these presumptions remain in force until the SEC makes a determination to the contrary. Because the SEC has not made any such determination, whether MFS and Scott can be said to have controlled the Independent Trustees or not, plaintiffs cannot rely on § 80-a2(a)(9). Scott and MFS did not, then, "control" the Independent Trustees and "cause" them to not renew NMI's contract. Scott and MFS's motion to dismiss with prejudice the first and fifth causes of action is granted.

B

1.

Plaintiffs bring their second and sixth causes of action against the Independent Trustees, Scott and MFS for breach of fiduciary duty under Delaware statutory and common law. Defendants argue that the BJR protects them from liability. This analysis is identical to that on the BJR in section II.A.2. above. Thus, the Independent Trustees' motion to dismiss the second and sixth causes of action for breach of fiduciary duty is denied because plaintiffs have adequately pled to overcome the presumption of the BJR.

2.

Harriman v. E. I. DuPont De Nemours & Co., 372 F. Supp. 101 (D. Del. 1974).

Plaintiffs cannot plead an action under Delaware law for breach of fiduciary duty against Scott and MFS. Plaintiffs assert that Scott and MFS breached a fiduciary duty to Fund shareholders by convincing the Independent Trustees not to renew NMI's investment advisory contract just as they did in their first and fifth causes of action. At the time the decision was made by the Independent Trustees on March 13, 1997, Scott and MFS did not owe a fiduciary duty to the Fund or its shareholders under Delaware law. MFS did not become the investment company advisor until after that March 13 vote, and Scott was not a trustee until April 10, 1997.

Under Delaware law, the analysis is similar to that under the ICA. Scott was not a trustee, and MFS was not the investment advisor at the time the Independent Trustees voted not to renew NMI's investment advisor contract on March 13, 1997. In *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1056 (Del. Ch. 1984), the Court made it clear that "state law claims of breach of . . . fiduciary relationship must subsist on the actuality of a specific legal relationship, not its potential."

Scott and MFS cannot be considered "control persons" under Delaware law just as they could not be so considered under the ICA. "Control" in Delaware means ownership of voting shares as it does under the ICA. For example, in *Harriman v. E. I. DuPont De Nemours & Co.*, 372 F. Supp. 101 (D. Del. 1974), the Court discussed several ways that outsiders could be considered to control other companies under Delaware law. *Id.* at 106. All such examples dealt with stock ownership. *Id.* The Gilbert Court also determined that outsiders do not assume a fiduciary duty to a corporation's shareholders because they have "superior bargaining position

in dealing with management." *Gilbert*, 490 A.2d at 1055. Scott and MFS's motion to dismiss the second and sixth causes of action with prejudice is granted.[10]

C.

Plaintiffs have brought four causes of action against Adams only. Adams was the Independent Trustees' legal advisor from October 1995 to July 14, 1997. The third and seventh causes of action are for breach of fiduciary duty under California law. The fourth and eighth causes of action are for negligence under California law.[11]

1.

Plaintiffs' third and seventh causes of action are brought against Adams alone for breach of fiduciary duty.

---

[10] Because the Court dismisses these claims, it does not reach Scott and MFS's contention that the Investment Advisors Act of 1940 preempts these state law claims.

[11] As an introductory note, plaintiffs made numerous mistakes in their opposition to Adams' motion. For example, they attribute two separate quotations to the Court in *Morales v. Field, DeGoff, Huppert & MacGowan*, 99 Cal. App. 3d 307, 160 Cal. Rptr. 239 (1979). In reality, these quotations come from the depublished case of *Gump v. Wells Fargo Bank*, N.A., 192 Cal. App. 3d 222, 237 Cal. Rptr. 311, 335 (1987). A depublished case, of course, cannot be cited as authority. The Court cannot have any confidence in plaintiffs' counsel or plaintiffs' case when it is confronted by such egregious mistakes.

Plaintiffs contend that Adams, by virtue of his position as counsel to the Independent Trustees, had a fiduciary duty to
the Funds' shareholders. Their main piece of authority, however, is the depublished *Gump v. Wells Fargo Bank*, N.A., 192 Cal. App. 3d 222, 237 Cal. Rptr. 311, 315 (1987). The only other authority offered is *Morales v. Field, DeGoff, Huppert & MacGowan*, 99 Cal. App. 3d 307, 160 Cal. Rptr. 239 (1979). In Morales, the Court stated that counsel to the trustee of a testamentary trust assumed a "relationship with the beneficiary akin to that between trustee and beneficiary." *Id.* at 316.

This language from Morales does not support plaintiffs' position. First, the testamentary trust in Morales is quite different from the business trust at issue here. Second, although there may be a "relationship" with the beneficiary, the beneficiary is not also the attorney's client, and there is no fiduciary duty. The court in *Lasky, Haas, Cohler & Munter v. Superior Court*, 172 Cal. App. 3d 264, 218 Cal. Rptr. 205 (1985), found that this language from Morales "falls short of a holding that the beneficiary is a client of the trustee's counsel." *Id.* at 283, 218 Cal. Rptr. at 216. Furthermore, *Pierce v. Lyman*, 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 (1991), makes it clear that, when no attorney-client relationship exists between counsel to trustees and beneficiaries, no fiduciary obligations exist between them. *Id.* at 1102. Adams' motion to dismiss the third and seventh causes of action is granted with prejudice.

2.

The fourth and eighth causes of action are brought

against Adams for negligence.

In order for plaintiffs to sue Adams for negligence, they must establish that he owed them a duty of care. *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1267, 266 Cal. Rptr. 483 (1990). Attorneys generally will not be liable to a third person who is not in privity of contract with them because attorneys only owe a duty to their client. *Schick v. Bach*, 193 Cal. App. 3d 1321, 1329, 238 Cal. Rptr. 902 (1987). Whether an attorney may under the circumstances owe a duty to a nonclient "is a question of law and depends on a judicial weighing of the policy considerations for and against the imposition of liability . . . ." *Goodman v. Kennedy*, 18 Cal. 3d 335, 342, 134 Cal. Rptr. 375, 556 P.2d 737 (1976) (citations omitted).

The court in *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App. 3d 692, 282 Cal. Rptr. 627 (1991), applied the above principles to determine that an attorney owed no duty to a nonclient. The attorney, corporate counsel, advised the majority shareholders on the procedure to follow in order to dilute the minority shareholder's stock. *Id.* at 698-700, 282 Cal. Rptr. at 630-32. The Court held that "an attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders . . . ." *Id.* at 703, 282 Cal. Rptr. at 634 (citing *Meehan v. Hopps*, 144 Cal. App. 2d 284, 293, 301 P.2d 10, 15-16 (1956)). Thus, the Court found that the attorney owed no duty to the minority shareholder, and could not be liable

to that shareholder.[12]

The situation here is analogous to that in Skarbrevik. Plaintiffs admit that Adams was counsel for the Independent Trustees. They allege, however, that Adams owed a duty of care to the Funds' shareholders because his advice to his clients might affect them. Thus, plaintiffs argue, any alleged negligent advice Adams gave to the Independent Trustees that damaged plaintiffs would be actionable.

In fact, Adams had no duty of care to the shareholders of the Fund because the Independent Trustees were his sole client. As in Skarbrevik, simply because Adams' advice might affect the shareholders does not give rise to a cause of action by those shareholders for negligence. Adams motion to dismiss the fourth and eighth causes of action is granted with prejudice.

D.

The ninth cause of action for corporate waste is brought by Navellier as an Interested Trustee of the Fund against all defendants. The essence of the claim is that defendants wasted the Fund's assets in the proxy battle to affirm MFS as the investment advisor. Defendants contend that the actions taken during the proxy contest were legal and necessary. Hence, they argue, those actions are protected by

---

[12] The Skarbrevik situation is analogous to the standard determined by the Court in *Goldberg*, 217 Cal. App. 3d at 1267, 266 Cal. Rptr. 483, for counsel for estate administrators. There the Court stated that the attorney for the administrator of an estate represents the administrator and not the estate so there is no duty to the estate. *Id.*

the BJR.[13]

If, however, defendants' actions in not renewing NMI's contract and ousting Navellier from the Board constituted breaches of fiduciary duty, any damages flowing from those breaches are also actionable. Just as those decisions by the Independent Trustees may be protected by the BJR, so any expenditures from waging the proxy contest may be protected by the BJR. Because plaintiffs have alleged sufficient facts to overcome the BJR presumption for the decision to replace NMI with MFS, though, the BJR is also overcome at this stage for the waste cause of action.

Because the Independent Trustees made the decision to terminate NMI and hire MFS, they are also liable for any alleged damages flowing from that decision. As discussed above, Scott and MFS are not liable for the initial decision of the Board. Any assets spent during the proxy contest flowed from that decision because by law the shareholders had to vote on MFS's contract pursuant to § 80a-15. Any assets spent by Scott and MFS while they were fiduciaries, then, were mandated by the Independent Trustees' decision. Scott and MFS are not liable for any "waste" arising from the proxy battle. Finally, as discussed above, Adams was also not a fiduciary at the time of the March 13, 1997, Board meeting so he cannot be liable for any alleged waste. In any

---

[13] The Independent Trustees also claim that Navellier should have made a demand on the Board to end the alleged waste. Because Navellier was engaged in this proxy contest with the Board, any such demand would clearly have been futile. Thus, Navellier may bring the claim without having made a demand on the Board.

event, Adams never had any authority to spend corporate assets.

Thus, the Independent Trustees' motion to dismiss the ninth cause of action is denied. Scott and MFS's and Adams' motions to dismiss the ninth cause of action for corporate waste are granted with prejudice.

E.

NMI brings the tenth cause of action for interference with prospective economic relations against all defendants.[14]

The Independent Trustees contend that an officer or director cannot be personally liable for interfering with an economic relationship of their employer. *See Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 590 (Del. Ch. 1994). While they are correct that this is the general rule, there is an exception for corporate officers who exceed the scope of their agency. *International Ass'n of Heat & Frost Insulators & Asbestos Workers, Local Union 42 v. Absolute Envtl. Servs., Inc.*, 814 F. Supp. 392, 400 (D. Del. 1993). This rule is consistent with the BJR, which holds corporate officers immune from personal liability when they make business decisions in their fiduciary capacity. *Id.* Because the rule for officer liability for intentionally interfering with economic

---

[14] Plaintiffs have failed to state whether this claim is brought under California or Delaware law. The Court will, then, refer to the law of both states.

relationships is the same standard as that for the BJR, as discussed above, plaintiffs have pled sufficient facts to defeat the Independent Trustees' motion. The Independent Trustees' motion to dismiss the tenth cause of action is denied.

Scott and MFS argue that they cannot be held liable for interference with the prospective economic relations of a competitor. They are correct that this "competition privilege" shields Scott and MFS from liability for allegedly persuading the Independent Trustees to allow NMI's contract to expire and hire MFS. The court in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 447, 902 P.2d 740 (1995), held that a plaintiff who seeks to recover for an alleged interference with prospective economic relations must prove that the defendant "engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." Plaintiffs here have not made, nor can they make, any such showing. Scott and MFS were within their rights to use persuasive sales tactics to convince the Independent Trustees to hire MFS. Scott and MFS's motion to dismiss the tenth cause of action is granted with prejudice.

Finally, Adams contends that he cannot be liable for interference with the prospective economic relations between NMI and the Fund because an attorney cannot be liable for urging his client to breach a contract.[15] *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321 (9th Cir. 1982). Plaintiffs, however, counter that Adams can be liable because he

---

[15] Of course, NMI's contract was not breached, it was simply allowed to expire.

participated in carrying out the breach in order to maintain his employment as counsel to the Independent Trustees. Plaintiffs have not, and cannot, allege that Adams did anything more than advise his clients how to proceed according to the law, and then carry out their decisions. Furthermore, any desire Adams had to promote his standing within his job does not negate his privilege to advise his clients to breach a contract. *Id.* at 328. Adams' motion to dismiss the tenth cause of action is granted with prejudice.

III.

Accordingly,

IT IS HEREBY ORDERED that:

1. The Independent Trustees' motion to dismiss the first and fifth causes of action brought under 15 U.S.C. § 80a-35(a) is DENIED, but Scott and MFS's motion to dismiss these causes of action is GRANTED with prejudice.

2. The Independent Trustees' motion to dismiss the second and sixth causes of action for breach of fiduciary under Delaware law is DENIED, but Scott and MFS's motion to dismiss these claims is GRANTED with prejudice.

3. Adams' motion to dismiss the third and seventh causes of action for breach of fiduciary duty under California law is GRANTED with prejudice.

4. Adams' motion to dismiss the fourth and eighth causes of action for negligence under California law is GRANTED with prejudice.

5. The Independent Trustees' motion to dismiss the ninth cause of action for waste is DENIED, but Scott and MFS's and Adams' motions to dismiss the ninth cause of action are GRANTED with prejudice.

6. The Independent Trustees' motion to dismiss the tenth cause of action for interference with prospective economic relations is DENIED, but the motions to dismiss of Scott and MFS and Adams to dismiss the tenth cause of action are GRANTED with prejudice.

Dated: July 22, 1998.

William H. Orrick

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C-97-1258 WHO

[Filed February 23, 1998]

ROSEMARY J. McLACHLAN, Trustee of the Mary Butschek Living Trust; MARTIN BILLETT, an individual on his own behalf and on behalf of those similarly situated; WILLIAM RAUTENBERG, an individual on his own behalf and on behalf of those similarly situated; FAITH C. RAUTENBERG, an individual on her own behalf and on behalf of those similarly situated; MARK SCHULTZ, an individual on his own behalf and on behalf of those similarly situated; GAIL SULLIVAN, an individual on her own behalf and on behalf of those similarly situated; THOMAS SULLIVAN, an individual on his own behalf and on behalf of those similarly situated; LOUIS G. NAVELLIER, an individual and

Trustee and Shareholder of the Navellier Series Fund on his own behalf as a Trustee on behalf of The Navellier Series Fund and as a class representative on behalf of those Navellier Series Fund shareholders similarly situated; and Navellier Management, Inc. individually	)
Plaintiffs,	)
v.	)
DONALD SIMON, an individual and former Trustee of The Navellier Series Fund; KENNETH SLETTEN, an individual and former Trustee of The Navellier Series Fund; LAWRENCE BIANCHI, an individual and former Trustee of The Navellier Series Fund; ARNOLD SCOTT an individual and former Trustee of the MFS Series Trust; and ROY ADAMS, an individual; MASSACHUSETTS FINANCIAL SERVICES, a corporation	)
Defendants.	)

FIRST AMENDED CLASS ACTION COMPLAINT

1. Plaintiffs, Gail Sullivan, Thomas Sullivan, William

Rautenberg, Faith C. Rautenberg, Mark Schulz and Louis Navellier individually; and as a Trustee of The Navellier Series Fund on behalf of themselves and on behalf of all The Navellier Series Fund's (the "Fund") beneficial owners, who redeemed their Fund shares between March 14 1997 and July 14 1997 and Martin Billett, Rosemary McLachlan and Louis Navellier individually and on behalf of all the beneficial owners of the Fund who remained in the Fund between March 14, 1997 and are subjected to a pro rata share of the capital gains taxes imposed as a result of the Fund's sales of Fund securities sold by Massachusetts Financial Services ("MFS") between March 15, 1997 and July 14, 1997 or the sale by Navellier Management, Inc. of securities purchased for the Fund by MFS, and Plaintiff Navellier Management, Inc, individually allege as follows:

JURISDICTION

2. This Court has original jurisdiction of the federal securities claims alleged herein pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 80a-43. Defendants used directly and indirectly means and instrumentalities of interstate commerce, including the mails and telephonic communications.

VENUE

3. Venue is proper in this district Because Defendants are found here and committed some or all of the wrongful acts in this District.

PARTIES

4. Plaintiff Louis Navellier ("LN") is an individual, a beneficial owner of shares in The Navellier series Fund and is a former and present Trustee of The Navellier Series Fund (the "Fund"). LN brings the First through Eighth causes of action individually and as a class representative and brings the Ninth cause of action for waste as a Trustee of the Fund on behalf of the Fund to recover the Fund's assets improperly spent by Defendants.

5. Plaintiffs Gail Sullivan, Thomas Sullivan, William Rautenberg, Faith C. Rautenberg, Mark Schulz and Louis Navellier bring the First through Fourth causes of action individually and as class action representatives on behalf of all shareholders of the Fund who redeemed their shares of the Fund between March 14, 1997 and July 14, 1997.

6. Plaintiffs Martin Billett, Rosemary McLachlan and Louis Navellier bring the Fifth through Eighth causes of action individually and as class action representatives on behalf of all shareholders of the Fund who remained in the Fund after March 14, 1997 and who incurred a portion of the capital gains taxes recognized as a result of the sale of Fund securities by MFS from March 14 1997 through July 14 1997 and from the sale of the Fund's securities purchased by MFS and sold by Navellier Management, Inc ("NMI") after July 14, 1997.

7. Defendant Donald Simon is an individual and former Trustee of the Fund who resides in Tiburon, California and who committed some or all of the wrongful acts alleged

herein in the Northern District of California.

8. Defendant Kenneth Sletten is an individual and former Trustee of the Fund who resides in Foster City, California and who committed some or all of the wrongful acts alleged herein in the Northern District of California

9. Defendant Lawrence Bianchi is an individual and former Trustee of the Fund who resides in Boston, Massachusetts and who committed some or all of the wrongful acts alleged herein in the Northern District of California or with the intent to cause harm and/or which had a harmful effect in the Northern District of California.

10. Defendant Arnold Scott is an individual and former Trustee of the Fund who Plaintiffs believe resides in Boston, Massachusetts and who conspired with other Defendants to commit and did commit the wrongful acts alleged herein in the Northern District of California and who committed the wrongful acts alleged herein with the intent to and which actually caused harmful effects in the Northern District of California.

11. Defendant Roy Adams is an individual who resides in Moraga, California and who committed some or all of the wrongful acts alleged herein in the Northern District of California and who committed the wrongful acts alleged herein with the intent to cause harmful effects in the Northern District of California.

11a. Defendant Massachusetts Financial Services (MFS) is

a corporation with its principal place of business in Boston, Massachusetts and which transacts business in the Northern District of California and which committed some of the wrongful acts alleged herein in the Northern District of California and did so with intent to cause and did cause harm in the Northern District of California.

12. Defendants and each of them were at all times agents and/or employees of the other Defendants and committed the wrongful acts alleged herein for and on behalf of each such other Defendant and each Defendant conspired and agreed with or authorized and ratified the acts of each other Defendant and of the acts as alleged herein of MFS and its directors, officers and employees.

13. Plaintiffs are informed and believe that MFS, Arnold Scott, Steven Cavan, James Bordewick and other directors, officers and employees of MFS conspired with and committed wrongful acts which harmed and were intended to harm Plaintiffs herein. Plaintiffs have not begun or completed discovery and will seek leave to amend to add MFS directors, officers and employees as additional Defendants if, as Plaintiffs believe, further discovery indicates that said persons were involved and caused injury to Plaintiffs and the class.

BACKGROUND

14. On May 15, 1993 Louis Navellier ("LN") and Navellier Management, Inc. ("NMI") caused to be organized The Navellier Series Fund (the "Fund") as a Delaware business trust for the purpose of engaging in the business of investing assets as an open end investment company.

15. Louis Navellier and Jack Drinkwater were elected as interested Trustees of the Fund and Donald Simon, Kenneth Sletten and Lawrence Bianchi were elected as "independent" Trustees of the Fund. Defendants Simon, Sletten and Bianchi were each paid trustee fees by the Fund of $10,000 per year if the Fund's assets were under $200 million. Their trustee fees increased to $20,000 each if the Fund's assets exceeded $200 million and their trustee fees increased again if the Fund's assets exceeded One Billion dollars. Jack Drinkwater was the marketing director for Navellier & Associates, Inc. He and Kenneth Sletten and Lawrence Bianchi were longtime friends.

16. On May 15, 1993, NMI entered into an investment advisory agreement with the Fund and also entered into an administrative services agreement with the Fund.

17. Under the investment advisory agreement, NMI provided day to day investment advice and managed the Fund's assets. The initial term of the investment advisory contract was two years, renewable annually thereafter if approved by a majority of the Independent Trustees. The investment advisory agreement provided for NHI to be paid an annual advisory fee of 1.25% of the Fund's average daily net assets under management.

18. The administrative services agreement provided that NMI would also provide administrative services to the Fund and would be paid annually 0.25% of the Fund's average daily net assets under management for providing such administrative services. The administrative services agreement was also renewable annually, subject to approval by a

majority of the Independent Trustees.

19. On May 15, 1995 the investment advisory agreement and the administrative services agreement between NMI and the Fund were each renewed for another year by Defendants Simon, Sletten and Bianchi.

20. In July 1995, Jack Drinkwater was terminated as Marketing Director for Navellier & Associates, Inc. and resigned as a Trustee of the Fund. Mr. Drinkwater was replaced as Trustee by Plaintiff Alan Alpers, a NMI employee and Portfolio Manager of the Fund. Messrs. Simon, Sletten and Bianchi were extremely upset that their friend Mr. Drinkwater had been terminated by Navellier & Associates, Inc.

21. On August 28, 1995 Mr. Navellier organized a no load mutual fund, The Navellier Performance Funds. Mr. Navellier was elected an interested Trustee of The Navellier Performance Funds and Messrs. Barry Sander, Joel Rossman, Jacques Delacroix and Arnold Langsen were elected as Independent Trustees of The Navellier Performance Funds.

22. Defendants Simon, Sletten and Bianchi were extremely upset that their friend Jack Drinkwater had been terminated from Navellier & Associates, Inc. and that they had not been appointed or elected as Trustees of The Navellier Performance Funds. They secretly decided and agreed among themselves to retaliate against Mr. Navellier.

23. In October 1995, Defendants Simon, Sletten and Bianchi voted for the Fund to retain Defendant Roy Adams as

attorney for the Independent Trustees (Defendants Simon, Sletten and Bianchi) of the Fund, ostensibly to advise them on their fiduciary obligations to the Fund's shareholders. Mr. Adams had previously been employed by a law firm that had advised a mutual fund in connection with the ouster of its investment advisor.

24. Shortly after being retained as attorney for Defendants Simon, Sletten and Bianchi, Defendant Adams recommended a number of revisions to the Fund's corporate documents, including changes to the Fund Trust Agreement and By-Laws, some of which revisions were ostensibly designed to limit the Trustees' personal liabilities for acts committed as Trustees of the Fund.

25. Mr. Navellier objected to most of Mr. Adams' proposed revisions.

26. On April 26, 1996 at a meeting of the Board of Trustees of the Fund, Mr. Navellier moved to merge the Fund into The Navellier Performance Funds in a tax-free reorganization whereby the assets of the Fund would be transferred to a portfolio of The Navellier Performance Funds in exchange for shares of The Navellier Performance Funds. The merger was proposed in order to effect economies of scale and reduce the operating expenses of the Fund. Mr. Navellier also felt that the Fund could be better marketed through discount brokerage firms as part of a no load mutual fund family rather than as a load mutual fund. The merger would have had the effect of eliminating Messrs. Simon, Sletten and Bianchi as Trustees, would have eliminated their $20,000/year Trustees fees and would have eliminated Mr.

Adams' compensation as attorney to the Independent Trustees. At the time of Mr. Navellier's merger proposal, the Fund had approximately $250 million in assets and Messrs. Simon, Sletten and Bianchi were each being paid at the rate of $20,000 per year for being Trustees of the Fund.

27. Messrs. Simon, Sletten and Bianchi voted against the merger proposal and because they constituted a majority of the five Trustees of the Fund, defeated, the merger proposal. Mr. Navellier then indicated to Messrs. Simon, Sletten and Bianchi that if the Fund was not merged, that NMI might resign as Investment Advisor to the Fund because he felt that Defendants Simon, Sletten and Bianchi were not acting in the best interests of the Fund shareholders.

28. Defendants Simon, Sletten and Bianchi then voted to terminated Samuel Kornhauser as legal counsel to the Fund, claiming for the first time that he now had a conflict of interest by being attorney for Mr. Navellier and the Fund.

29. Mr. Simon then effectively took over as Chairman of the Board of Trustees of the Fund and Mr. Adams effectively took over as counsel to the Fund.

30. Defendants Simon, Sletten and Bianchi urged Mr. Navellier to have NMI remain as Investment Advisor to the Fund and ostensibly agreed to reconsider Mr. Navellier's proposal to merge the Fund into The Navellier Performance Funds.

31. Based on the representations of Defendants Simon, Sletten and Bianchi to reconsider their opposition to the

merger, NMI agreed, on May 15, 1996, to a six-month extension of its investment advisory and administrative service agreements with the Fund.

32. Plaintiffs are informed and believe that Defendants Simon, Sletten and Bianchi made the promise to seriously reconsider their opposition to the merger in order to buy time to find another investment advisor and thereby entrench themselves as continued Trustees of the Fund and to entrench Defendant Adams as counsel to the Independent Trustees.

33. Thereafter, ostensibly as part of their review of the merger proposal, Defendants Simon, Sletten and Bianchi, through Defendant Adams, demanded that Mr. Navellier provide them with detailed financial information regarding his personal finances and the finances of all his related entities. Mr. Navellier agreed to provide said Defendants with all relevant financial and other information reasonably necessary to a consideration of the merger (Defendants as Trustees had already had access to all Fund financial Information for over three years), but refused to give said Defendants (who at the time were shopping for another investment advisor) proprietary financial information which, Mr. Navellier feared, said Defendants would give to his competitors.

34. In a series of letters, Mr. Navellier, through his counsel, sought to work out a compromise whereby he would provide said Defendants with all reasonably relevant information, but said Defendants refused to meet or agree to compromise and instead wanted to stand on their version of the record that Mr. Navellier had refused to provide them with information.

35. In early November 1996, Defendants contacted the Enforcement Division of the Securities Exchange Commission ("SEC"} in an effort to "force" Mr. Navellier to provide them with the proprietary financial information they had been demanding, now claiming they needed such information in order to be able to make a decision on whether to renew the NMI investment advisory and administrative services agreements which were to expire on November 15, 1996 if not renewed.

36. Mr. Navellier responded that he had been willing to give them relevant information, but not irrelevant, proprietary information and that given said Defendants' actions, that NMI might not want to agree to a renewal of its contracts with the Fund.

37. Despite amid Defendants' efforts to have the SEC force Mr. Navellier to divulge proprietary information, the SEC refused to order Mr. Navellier to turn over the demanded information. Rather the SEC suggested that the issue of a merger be presented to the Fund shareholders by way of a proxy.

38. On November ll, 1995 Defendants Simon, Sletten and Bianchi held a meeting of the Fund's renew NMI's investment advisory agreement and administrative services agreement for four months, and further voted to instruct Mr. Navellier to prepare and file a proxy statement for a shareholder vote on the issue of whether to merge the Fund into The Navellier Performance Funds.

39. On December 15, 1996 NMI presented a merger

proxy and solicitation materials to the SEC, requesting informal review and comments. On March 6, 1997 NMI formally filed an N-14 merger proxy with the SEC for review and clearance

40. On March 7, 1997 Defendants Simon, Sletten and Bianchi held a Fund Board of Trustees meeting, ostensibly to consider renewing NMI's investment advisory and administrative services agreements pending the outcome of the shareholder vote on the merger. At the meeting, Defendants delayed a vote on renewing the NMI agreements so they could review the N-14 proxy filing.

41. The Trustees' meeting vas reconvened on March 10, 1997 and Defendant Simon, Sletten and Bianchi again delayed voting on whether to renew the NMI agreements, again ostensibly so they could further review the N-14 merger proxy material. Mr. Simon emphatically and falsely stated that Defendants Simon, Sletten and Bianchi were not discussing with any other investment advisor such advisor's becoming investment advisor to the Fund.

42. On March 11, 1997 Defendants Simon, Sletten and Bianchi noticed a Fund Board of Trustees meeting for March 13, 1997 in Foster City, California to consider hiring Massachusetts Financial Services ("MFS") as investment advisor, administrator and distributor for the Fund.

43. On March 13, 1997 a Fund Board of Trustees meeting vas held in Foster City, California Defendants Simon, Sletten, Bianchi and Adams attended that meeting in person,

Defendant Scott attended by phone along with other officers and employees of MFS. Mr. Navellier, Mr. Alpers and other employees end counsel for NMI attended in person. Mr. Navellier made detailed pleas to Defendants asking them to let the Fund shareholders vote on whether to merge and to renew the NMI contracts for a short period pending the outcome of the pending merger proxy. Mr. Navellier stated that the shareholders had invested in the Fund because they wanted NMI to manage the Fund, not MFS; that the shareholders could be harmed and forced to redeem if NMI was ousted as Investment Advisor; that there was no valid reason to install MFS at that point because pursuant to Rule 15a-4 of the Investment Company Act, the shareholders would have to vote within 120 days and approve MFS as investment advisor in order for MFS to remain as investment advisor. Therefore, since the shareholders would have to vote in any event, they should be allowed to do so before NMI was removed and MFS installed, i.e. that a shareholder vote should be held on the questions of whether to merge and whether to hire MFS and that the vote should take place before the Defendant Trustees removed NMI so that the shareholders could decide whether they wanted to retain NMI to manage their assets.

44. Defendants Simon, Sletten and Bianchi, with the assistance and in conspiracy with MFS, refused all of Mr. Navellier's proposals. Rather than act in the interests of the Fund shareholders and allow the Fund shareholders to decide whether they wanted NMI or MFS to manage the Fund, said Defendants placed their own personal interests ahead of their fiduciary duties to the Fund shareholders (to act in the best interests of the shareholders) by Defendants, efforts to retain their positions as Trustees, their trustee compensation and the

prestige that went with the position of Trustee and to "pay back" Navellier for terminating their friend Jack Drinkwater. The Defendant Trustees rejected every proposal made by Mr. Navellier to allow the shareholders to decide these important issues and instead took all steps to entrench themselves in their positions as Trustees.

45. Defendant Scott and the other MFS representatives were asked by Mr. Navellier to hold off on accepting the Defendant Trustees' offer to MFS to become investment advisor until the shareholders could vote on the issue but Defendant Scott and the other MFS representatives refused.

46. Plaintiffs are informed and believe that an additional reason why the Defendant Trustees refused to delay hiring MFS was because MFS (as part of their deal to become investment advisor to the Fund) had agreed to add Defendants Simon, Sletten, Bianchi and Adams as additional insureds on MFS's D&O and E&O insurance policies to cover said Defendants. Defendants Simon Sletten and Bianchi had had D&O and E&O insurance coverage from the Fund through June 1996 but Mr Adams, when he took over as de facto counsel to the Fund, had failed to renew the policy and therefore said Defendant Trustees had been without insurance to cover their actions.

47. At the March 13, 1997 Board of Trustees meeting, Defendants Simon, Sletten and Bianchi, with the aid and assistance of MFS and as a part of their conspiracy with MFS for MFS to take over management of the Fund, voted <u>without a shareholder</u> vote or any input from Fund shareholders, not to renew NMI's contracts thereby terminating NMI as of March 15, 1997 and voted further to hire MFS as investment

advisor and administrator to the Fund for the same compensation and on essentially the same terms as had been previously given to NMI. As part of their agreement to hire MFS, Defendants Simon, Sletten and Bianchi would remain as Trustees of the Fund.

48. Thereafter, Defendants Simon, Sletten, Bianchi, Adams, Scott, MFS and various MFS employees and officers, through Defendants Simon and Adams, put out various press releases add media interviews making false and defamatory remarks about Mr. Navellier and NMI (including but not limited to press releases and proxy statements containing false accusations that NMI's contracts had not been renewed because of "regulatory problems" and that Mr. Navellier did not own NMI). These false statements were made in an effort to destroy Mr. Navellier's credibility and thereby his ability to mount any credible opposition to said Defendants' proxy (to approve MFS as investment advisor to the Fund).

49. As part of Defendants' efforts to entrench themselves Trustees and investment advisor of the Fund Defendants Simon Sletten and Bianchi held a Board of Trustees meeting on April 10, 1997 and voted to increase the number of Fund Trustees from five to six. They then voted to appoint Defendant Arnold Scott as the sixth Trustee. They then voted 4 to 2 to remove Mr. Navellier and Mr. Alpers as Trustees of the Fund end then voted to reduce, the number of Trustees of the Fund from six to four. The net effect of those votes was to oust Messrs. Navellier and Alpers from the Fund's Board of Trustees, to further entrench themselves as Trustees, to entrench MFS as investment advisor and to obstruct any effective opposition to their proxy to approve MFS.

50. At that meeting, Defendant Simon was officially appointed Chairman of the Board of Trustees of the Fund. Defendants then voted to hold an early shareholder meeting, authorized the filing of a proxy to hire MFS on an expedited basis, and agreed that Defendants Simon, Sletten and Bianchi would stay on as Trustees for up to 18 months or longer if MFS was approved by the shareholders.

51. Also as part of Defendants' efforts to entrench themselves and in breach of their fiduciary duties to the Fund shareholders, they attempted to block all efforts to oppose approval of MFS. Thus, they contacted the SEC and attempted to prevent clearance of NMI's merger proxy (which would have allowed Fund shareholders to vote on whether to merge the Fund into The Navellier Performance Funds, thereby effectively Voting against MFS and the Independent Trustees) by telling the SEC that Navellier had no authority to pursue the merger proxy and that such a proxy would be a meaningless straw vote because Defendants, as Fund Trustees, would never approve a merger of the Fund into The Navellier Performance Funds. Defendants and MFS also pressured the Fund's outside auditors, Deloitte & Touche, to not provide Navellier with a consent to use the financial statements (which Deloitte had previously prepared for the Fund) as part of Navellier's merger proxy, knowing that such consent was an essential requirement to obtaining clearance from the SEC for Navellier's merger proxy.
Defendants and MFS also pressured Navellier's proxy solicitor, Shareholders Communications, Inc., to resign as proxy solicitor and attempted to pressure Navellier's printer to not print or EDGARIZE Navellier's proxy filings with the SEC.

52. Defendants and MFS also pressured various brokerage firms holding Fund shares in street name to vote those shares as a "routine" vote in favor of management (i.e. Defendants) rather than treating the MFS proxy vote as a contested vote which would have prevented the brokerage firms from automatically voting the shares in favor of Defendants.

53. All of these actions and false and misleading statements in the press and proxy filings were taken and made by Defendants in order to entrench themselves as Trustees and investment advisor of the Fund and to block any effective opposition to Defendants' efforts to have MFS approved as investment advisor, all to the detriment of the Fund shareholders.

54. As of March 13, 1997 the Fund had approximately 8,000 shareholders and about $180 million in assets. When Defendants' actions in ousting NMI as investment advisor were made public, the shareholders of the Fund (who had invested in the Fund because NMI was its investment advisor) were forced to either redeem and incur unwarranted and unnecessary capital gains taxes (by being forced to redeem) or remain in the Fund (in order to avoid the capital gains taxes they would incur by redeeming) and have their assets managed by an investment advisor they had not picked to manage their assets. By remaining in the Fund, shareholders also risked having to pay substantially higher capital gains taxes if MFS sold off Fund securities which NMI had invested in.

55. During the period between March 14, 1997 (when it was announced that NMI was out and MFS was in as the Fund's investment advisor) and July 14, 1997 (when NMI vas

reappointed as Investment Advisor to the Fund after defeating Defendants' shareholder vote to approve MFS), approximately 4,000 shareholders redeemed and took with them approximately $90 million in assets on which they had to pay capital gains taxes as a result of being forced to redeem.

56. Once MFS took over management of the Fund, it sold off a large amount of the securities which NMI had invested in, thereby generating approximately $12-14 million in capital gains taxes which the remaining Fund shareholders will have to pay but which would not have been incurred and which they therefore would not have had to pay, if Defendants had not wrongfully ousted NMI and installed MFS. Thus, the Fund shareholders who were attempting to make the best of a bad situation by remaining in the Fund and waiting to vote on the Navellier proposed tax-free merger (thereby regaining NMI as their Investment Advisor and avoiding redemption-generated capital gains taxes) were still damaged by Defendants' wrongful acts by being subjected to the capital gains taxes generated by MFS's sell-off of Fund securities.

57. On May 23, 1997 a Fund shareholder vote was held and the shareholders voted against retaining MFS as investment advisor to the Fund.

58. On July 14, 1997, Defendants Simon, Sletten and Bianchi appointed NMI to return as Investment Advisor and Administrator of the Fund and then said Defendants resigned as Trustees of the Fund.

59. Between March 13, 1997 and July 15, 1997, i.e. while

MFS and Defendants were managing the Fund, Defendants caused nearly $1 million to be needlessly and wastefully spent on Defendants' proxy battles (approximately $600,000 in legal fees to Defendants' attorney), (of which $100,000 was paid to Defendant Roy Adams). and nearly $400,000 in proxy solicitation costs), all of which wasted expenditures could have been avoided if Defendant had engaged in the orderly, pending and proposed shareholder vote which the SEC and Navellier had proposed and which Navellier had to agree to.

60. In fact, Navellier had agreed to pay for the merger proxy which would have resolved the dispute by a shareholder vote at no cost to the shareholders. (Navellier paid for all of its proxy costs.)

CLASS ACTION

61. Plaintiffs Gail Sullivan, Thomas Sullivan, Mark Schulz, William Rautenberq, Faith C. Rautenberg and Louis Navellier ("Class A Plaintiffs") individually as Fund shareholders and as representatives of the class of Fund shareholders who redeemed out of the Fund between March 13, 1997 and July 14, 1997 and who incurred capital gains taxes on their redemptions, bring the First, Second, Third and Fourth causes of action as class actions pursuant to Rule 23(b)(3) Of the Federal Rules of Civil Procedure. Excluded from the class are the Defendants herein, members of the immediate family of each of the individual Defendants, and any persons, firm, trust, corporation, officer, director or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, agents,

affiliates, heirs, successors in interest or assigns of any such excluded party.

62. The members of the class are so numerous that joinder of all members is impracticable. The precise number of class members is unknown to Plaintiffs at this time. The class members are believed to number in excess of 4,000. The names
and address of the class members can be ascertained from the books and records of the Fund.

63. A class action is superior to other available methods for
the fair and efficient adjudication of this case. Since the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the class members to seek redress for the wrongful conduct alleged. Class A Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a class action.

64. The issues of law and fact relative to Class A Plaintiffs'
claims are common to the claims of all the other members of the class in that each suffered damages in the form of needless and excessive capital gains taxes they had to pay upon redemption of their Fund shares, which shares they had to redeem as a result of Defendants' wrongful termination of NMI as Investment Advisor to the Fund. Common issues of law and fact include but are not limited to:

a) Whether Defendants breached their fiduciary

duties to the Fund shareholders by terminating NMI as Investment Advisor.

b) Whether Defendants sought to entrench themselves as Trustees in derogation of the best interests of the Fund shareholders.

c) Whether Defendants' wrongful termination of NMI and substitution of MFS without a shareholder vote caused Class A Plaintiffs and the class to incur otherwise unnecessary capital gains taxes by redeeming out of the Fund.

65. The issues of law and fact common to the class predominate over individual issues of law and fact.

66. Class A Plaintiffs' claims are typical of the claims of rest of the class members in that all suffered similar damages (imposed capital gains taxes on redemption) as a result of Defendants' wrongful conduct. Class A Plaintiffs and the class are all interested in recovering from Defendants for the damage caused by Defendants' wrongful acts.

67. Class A Plaintiffs will fairly and adequately represent the class. Plaintiffs are familiar with the facts and have retained counsel who is experienced in securities and class action litigation.

68. Notice to the class members can be provided by a combination of published notice and first class mail using techniques and a form of notice similar to those customarily used in class actions arising under federal securities laws.

FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty, 15 U.S.C. § 80a-35(a))

69. Class A Plaintiffs reallege and incorporate Paragraphs 1 through 68 as though fully set forth herein.

70. Defendants Simon, Sletten, Bianchi, Scott and MFS breached their fiduciary duties under 15 U.S.C. § 80a-35(a) to act in the best interests of the Fund shareholders in carrying out their duties as Trustees and investment advisor of the Fund by terminating NMI and thereby placing their self-interest (in retaining their positions, compensation and prestige as Trustees and investment advisor of the Fund and in "paying Navellier back" for terminating Jack Drinkwater) over the interests of the shareholders in retaining NMI as Investment Advisor for the Fund.

71. As a direct and proximate cause of Defendants' breaches of their fiduciary duties under 36(a) of the '40 Act, Class A Plaintiffs and the class were damaged in the form of having to pay otherwise needless capital gains taxes when they were forced to redeem after said Defendants ousted the Investment Advisor that class A Plaintiffs and the class had invested their money with.

72. Class A Plaintiffs and the class have been damaged in an amount to be determined according to proof.

SECOND CAUSE OF ACTION
(Common Law Breach of Fiduciary Duty)

73. Class A Plaintiffs reallege and incorporate Paragraphs 1 through 72 as though fully set forth herein.

74. Defendants Simon, Sletten, Bianchi, Scott and MFS, as Trustees of the Fund, a Delaware Business Trust, and as investment advisor, were fiduciaries under Delaware statutory and common law and as such had a fiduciary duty to act in the best interests of the shareholders of the Fund and to place their personal interests over the best interests of the shareholders.

75. Said Defendants breached their fiduciary duties under Delaware law by ousting NMI and attempting to keep MFS as investment advisor in order to entrench themselves as Trustees of the Fund in derogation of the best interests of the shareholders of the Fund.

76. Said Defendants' breaches of their fiduciary duties were
the direct and proximate cause of Class A Plaintiffs' and the class' damages and caused them to incur unnecessary capital gains taxes which, but for said Defendants' breaches, Class A Plaintiffs and the class would not have incurred. Said damages were in an amount to be determined according to proof.

THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty Under California Law)

77. Class A Plaintiffs reallege and incorporate Paragraphs 1 through 76 as though fully set forth herein.

78. Defendant Roy Adams was at all times pertinent herein an attorney licensed to practice law in California.

79. Defendant Roy Adams from October 1995 through July 14, 1997 was the independent counsel to the Independent Trustees of the Fund (Defendants Simon, Sletten and Bianchi) and as such was required !to give said Defendant Trustees advice as to how to carry out their fiduciary duties so as to act in the best interest of the shareholders. In giving that advice and in discussing with said Defendants what actions to take with regard to retaining or replacing NMI, Defendant Adams knew that such advice and instructions would flow from said Defendant Trustees to and for the benefit of the best interests of the shareholders of the Fund.

80. As a California attorney and attorney for the controlling Trustees of the Fund, Adams was acting as a fiduciary on behalf of the shareholders of the Fund in advising and instructing the Defendant Independent Trustees and was under a fiduciary duty not to place his personal interests above the interests of the shareholders of the Fund, i.e. he had a duty to advise and instruct the Defendant Trustees to act in the best interests of the Fund shareholders.

81. Defendant Adams breached his fiduciary duty to the class by placing his own financial interest in remaining as counsel to the Independent Trustees (and avoiding a merger, which would have ended his job as attorney for the Independent Trustees) over the best interests of the shareholders.

82. Defendant Adams advised, instructed, conspired with and carried out Defendants' efforts to entrench themselves in office and to defeat Navellier's merger efforts by, among other things, instructing Defendant Trustees to oust NMI without a shareholder vote, to reject Navellier's efforts on March 13, 1997 to renew NMI as Investment Advisor pending a vote on the merger and/or MFS, by issuing false and derogatory statements to the press and press releases in order to discredit Navellier and NMI and thereby defeat Navellier's opposition to MFS's proxy solicitation.

83. Defendant Adams personally benefitted from his breaches by receiving in excess of $100,000 in attorney's fees from the Fund (shareholders) for his efforts to entrench Defendant Trustees, and thereby himself, in office.

84. Defendant Adams' breaches of fiduciary duty were the direct and proximate cause of damages to Class A and the class in the form of unnecessary redemption capital gains which Plaintiffs and the class would not have incurred but for Adams' breaches of fiduciary duty.

85. Defendant Adams' breaches were wanton, willful, oppressive, despicable, entitling the class to punitive damages.

FOURTH CAUSE OF ACTION
(Negligence)

86. Class A Plaintiffs reallege and incorporate Paragraphs 1 through 85 as though fully set forth herein.

87. In acting as attorney for the Defendant Trustees of the Fund who were fiduciaries for the Fund shareholders, Defendant Adams owed a duty of care to the Fund shareholders to act in a reasonable way in instructing the Independent (and controlling) Trustees.

88. Mr. Adams breached his duty of care to Class A and the shareholders by committing the wrongful acts alleged herein.

89. As a direct and proximate cause of Defendant Adams' negligence, Class A Plaintiffs and the class were damaged as alleged above in an amount to be determined according to proof.

CLASS ACTION

90. Plaintiffs Rosemary McLachlan, Martin Billett and Louis Navellier ("Class B Plaintiffs") bring the Fifth, Sixth, Seventh and Eighth causes of action individually and as representatives of the class of Fund shareholders who remained in the Fund after March 13, 1997 and through December 31, 1997 and who incurred a pro rata share of capital gains taxes as a result of MFS's sales between March 15 1997 and July 14, 1997 of Fund securities previously purchased by NMI and who also incurred capital gains taxes in the sales of securities by NMI after July 14, 1997 of securities purchased by MFS between March 14, 1997 and July 14 1997. Excluded from the class are the Defendants herein, members of the Immediate family of each of the individual Defendants , and any persons, firm, trust, corporation, officer, director or other individual or entity in

which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, agents, affiliates, heirs, successors in interest or assigns of any such excluded party.

91. The members of the class are so numerous that joinder of all members is impracticable. The precise number of class members is unknown to Plaintiffs at this time. The class members are believed to number in excess of 4,000. The names and address of the class members can be ascertained from the books and records of the Fund.

92. A class action is superior to other available methods for the fair and efficient adjudication of this case. Since the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the class members to seek redress for the wrongful conduct alleged. Class B Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a class action.

93. The issues of law and fact relative to Class B Plaintiffs' claims are common to the claims of all the other members of the class in that each suffered damages in the form of needless and excessive capital gains taxes they had to pay as a result of MFS's sale of Fund securities, as a result of Defendants' wrongful termination of NMI as Investment Advisor to the Fund. Common issues of law and fact include but are not limited to:

a) Whether Defendants breached their fiduciary

duties to the Fund shareholders by terminating NMI as Investment Advisor.

b) Whether Defendants sought to entrench themselves as Trustees in derogation of the best interests of the Fund shareholders.

c) Whether Defendants' wrongful termination of NMI and substitution of MFS without a shareholder vote caused Class B Plaintiffs and the class to incur otherwise unnecessary capital gains taxes.

94. The issues of law and fact common to the class predominate over individual issues of law and fact.

95. Class B Plaintiffs' claims are typical of the claims of the rest of the class members in that all suffered similar damages (imposed capital gains taxes) as a result of Defendants' wrongful conduct. Class B Plaintiffs and the class are all interested in recovering from Defendants for the damage caused

96. Class B Plaintiffs will fairly and adequately represent the class. Plaintiffs are familiar with the facts and have retained counsel who is experienced in securities and class action litigation.

97. Notice to the class members can be provided by a combination of published notice and first class mail using techniques and a form of notice similar to those customarily used in class actions arising under federal securities laws.

FIFTH CAUSE OF ACTION
(Breach of Fiduciary Duty 15 U.S.C. § 80a-35(a))

98. Class B Plaintiffs reallege and incorporate Paragraphs 1 through 97 as though fully set forth herein.

99. Defendants Simon, Sletten, Bianchi, Scott and MFS breached their fiduciary duties by terminating and assisting in terminating NMI.

100. As a direct and proximate result of said Defendants' breaches, Class B Plaintiffs and the class were damaged in an amount to be determined at trial in the form of capital gains taxes which they as remaining shareholders must pay pro rata on MFS's sales of Fund securities between March 15, 1997 and July 14, 1997 and from sales by NMI after July 14, 1997 of securities purchased by MFS.

SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty Under Delaware Common Law)

101. Class B Plaintiffs reallege and incorporate Paragraphs 1 through 100 as though fully set forth herein.

102. Said Defendants Simon, Sletten, Bianchi, Scott and MFS breached their fiduciary duties under Delaware Law as Trustees and investment advisor of a Delaware Business Trust by committing the wrongful acts alleged herein.

103. As a direct and proximate cause of said Defendants' breaches, Class B Plaintiffs and the class were damaged

according to proof at trial.

SEVENTH CAUSE OF ACTION
(Breach of Fiduciary Duty Under California Law)

104. Class B Plaintiffs reallege and incorporate Paragraphs 1 through 103 as though fully set forth herein.

105. Defendant Adams breached his fiduciary duty to Class B Plaintiffs and the class by his wrongful acts as alleged above.

106. As a direct and proximate cause of Defendant Adams' acts, Class B Plaintiffs and the class were damaged in an amount to be determined according to proof.

107. Defendant Adams' actions were wanton, willful, malicious and despicable, entitling Class punitive damages.

EIGHTH CAUSE OF ACTION
(Negligence)

108. Class B Plaintiffs reallege and incorporate Paragraphs 1 through 107 as though fully set forth herein.

109. Defendant Adams breached his duty of care to Class B Plaintiffs and the class by committing the wrongful acts alleged herein.

110. As a direct and proximate cause of Defendant Adams' negligence, Class B Plaintiffs and the class were damaged in

an amount to be determined according to proof.

NINTH CAUSE OF ACTION
(Waste)

111. Plaintiff Louis Navellier, as Trustee of the Fund on behalf of the other Trustees of the Fund ("Fund Plaintiff"), brings this cause of action on behalf of the Fund.

112. Fund Plaintiff (the Fund) realleges and incorporates herein Paragraphs 1 through 110 as though fully set forth herein.

113. The actions of Defendants Simon, Sletten, Bianchi, Adams, Scott and MFS in attempting to entrench themselves and MFS in office, in engaging in needless and wrongful proxy contests and efforts to block NMI's opposition proxy solicitations and incurring nearly $1 million in needless attorney's fees and proxy costs was a needless, unwarranted and wasteful use of Fund assets.

114. Said Defendants negligently and Improperly used said Fund assets and converted said Fund assets to Defendants' own and improper use.

115. As a direct and proximate cause of said Defendants' wrongful Waste, the Fund has been damaged in the amount of approximately $1 million, the exact amount of which will be determined according to proof.

TENTH CAUSE OF ACTION
(Interference With Prospective Economic Relations)

116. Plaintiff Navellier Management, Inc. ("NMI") brings this cause of action individually and not as a class action.

117. NMI realleges and incorporates herein Paragraphs 1 through 115 as though fully set forth herein.

118. Defendants Simon Sletten, Bianchi, Adams, Scott and MFS's acts causing the wrongful termination of NMI as Investment Advisor and Administrator to the Fund interfered with what would have been but for the Defendants' wrongful conduct, a continuation of its investment advisory and administrative duties for the Fund after March 5, 1997.

119. As a direct and proximate cause of said Defendants' wrongful conduct, NMI was damaged in the form of lost revenue from investment advisory and administrative services fees in an amount to be determined at trial.

WHEREFORE Plaintiffs pray as follows:

1. As to the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action, that they be certified as class actions on behalf of the respective classes.

2. As to each cause of action for damages according to proof.

3. For Plaintiffs' and the class' attorney's fees and costs and

4. For such other and further relief as the court deems appropriate.

DATED: 2-23-98 LAW OFFICES OF SAMUEL KORNHAUSER

BY: /s/_____

Samuel Kornhauser
Attorney for Plaintiffs

JURY DEMAND

Plaintiffs hereby renew their demand for a trial by jury.

DATED: 2-23-98 LAW OFFICES OF SAMUEL KORNHAUSER

BY: /s/_____

Samuel Kornhauser
Attorney for Plaintiffs

APPENDIX E

STATUTES
TITLE 15. COMMERCE AND TRADE

CHAPTER 2D. INVESTMENT COMPANIES AND ADVISORS

INVESTMENT COMPANIES
15 USCS § 80a-15 (2002)

Contracts of advisers and underwriters

(a) Written contract to serve or act as investment adviser; contents. It shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, has been approved by the vote of a majority of the outstanding voting securities of such registered company, and--

(1) precisely describes all compensation to be paid thereunder;

(2) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company;

(3) provides, in substance, that it may be terminated at any time, without the payment of any penalty, by the board of directors of such registered company or by vote of a majority of the outstanding voting securities of such company on not more than sixty days' written notice to the investment adviser; and

(4) provides, in substance, for its automatic termination in the event of its assignment.

(b) Written contract with company for sale by principal underwriter of security of which company is issuer; contents. It shall be unlawful for any principal underwriter for a registered open-end company to offer for sale, sell, or deliver after sale any security of which such company is the issuer, except pursuant to a written contract with such company, which contract--

(1) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company; and

(2) provides, in substance, for its automatic termination in the event of its assignment.

(c) Approval of contract to undertake service as investment adviser or principal underwriter by majority of noninterested directors. In addition to the requirements of subsections (a) and (b) of this section, it shall be unlawful for any registered investment company having a board of directors to enter into, renew, or perform any contract or

agreement, written or oral, whereby a person undertakes regularly to serve or act as investment adviser of or principal underwriter for such company, unless the terms of such contract or agreement and any renewal thereof have been approved by the vote of a majority of directors, who are not parties to such contract or agreement or interested persons of any such party, cast in person at a meeting called for the purpose of voting on such approval. It shall be the duty of the directors of a registered investment company to request and evaluate, and the duty of an investment adviser to such company to furnish, such information as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company. It shall be unlawful for the directors of a registered investment company, in connection with their evaluation of the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company, to take into account the purchase price or other consideration any person may have paid in connection with a transaction of the type referred to in paragraph (1), (3), or (4) of subsection (f).

(d) Equivalent of vote of majority of outstanding voting securities in case of common-law trust. In the case of a common-law trust of the character described in section 16(c) [15 USCS § 80a-16(c)], either written approval by holders of a majority of the outstanding shares of beneficial interests or the vote of a majority of such outstanding shares cast in person or by proxy at a meeting called for the purpose shall for the purposes of this section be deemed the equivalent of the vote of a majority of the outstanding voting securities, and the provisions of paragraph (42) of section 2(a) [15 USCS § 80a-2(a)(42)] as to a majority shall be applicable to the vote

cast at such a meeting.

(e) Exemption of advisory boards or members from provisions of this section. Nothing contained in this section shall be deemed to require or contemplate any action by an advisory board of any registered company or by any of the members of such a board.

(f) Receipt of benefits by investment adviser from sale of securities or other interest in such investment adviser resulting in assignment of investment advisory contract.

(1) An investment adviser, or a corporate trustee performing the functions of an investment adviser, of a registered investment company or an affiliated person of such investment adviser or corporate trustee may receive any amount or benefit in connection with a sale of securities of, or a sale of any other interest in, such investment adviser or corporate trustee which results in an assignment of an investment advisory contract with such company or the change in control of or identity of such corporate trustee, if--

(A) for a period of three years after the time of such action, at least 75 per centum of the members of the board of directors of such registered company or such corporate trustee (or successor thereto, by reorganization or otherwise) are not (i) interested persons of the investment adviser of such company or such corporate trustee, or (ii) interested persons of the predecessor investment adviser or such corporate trustee; and

(B) there is not imposed an unfair burden on such company as a result of such transaction or any express or

implied terms, conditions, or understandings applicable thereto.

(2) (A) For the purpose of paragraph (1)(A) of this subsection, interested persons of a corporate trustee shall be determined in accordance with section 2(a)(19)(B) [15 USCS § 80a-2(a)(19)(B)]: Provided, That no person shall be deemed to be an interested person of a corporate trustee solely by reason of (i) his being a member of its board of directors or advisory board or (ii) his membership in the immediate family of any person specified in clause (i) of this subparagraph.

(B) For the purpose of paragraph (1)(B) of this subsection, an unfair burden on a registered investment company includes any arrangement, during the two-year period after the date on which any such transaction occurs, whereby the investment adviser or corporate trustee or predecessor or successor investment advisers or corporate trustee or any interested person of any such adviser or any such corporate trustee receives or is entitled to receive any compensation directly or indirectly (i) from any person in connection with the purchase or sale of securities or other property to, from, or on behalf of such company, other than bona fide ordinary compensation as principal underwriter for such company, or (ii) from such company or its security holders for other than bona fide investment advisory or other services.

(3) If--

(A) an assignment of an investment advisory contract with a registered investment company results in a successor investment adviser to such company, or if there is a change in

control of or identity of a corporate trustee of a registered investment company, and such adviser or trustee is then an investment adviser or corporate trustee with respect to other assets substantially greater in amount than the amount of assets of such company, or

(B) as a result of a merger of, or a sale of substantially all the assets by, a registered investment company with or to another registered investment company with assets substantially greater in amount, a transaction occurs which would be subject to paragraph (1)(A) of this subsection, such discrepancy in size of assets shall be considered by the Commission in determining whether or to what extent an application under section 6(c) [15 USCS § 80a-6(c)] for exemption from the provisions of paragraph (1)(A) should be granted.

(4) Paragraph (1)(A) of this subsection shall not apply to a transaction in which a controlling block of outstanding voting securities of an investment adviser to a registered investment company or of a corporate trustee performing the functions of an investment adviser to a registered investment company is--

(A) distributed to the public and in which there is, in fact, no change in the identity of the persons who control such investment adviser or corporate trustee, or

(B) transferred to the investment adviser or the corporate trustee, or an affiliated person or persons of such investment adviser or corporate trustee, or is transferred from the investment adviser or corporate trustee to an affiliated person or persons of the investment adviser or corporate

trustee: Provided, That (i) each transferee (other than such adviser or trustee) is a natural person and (ii) the transferees (other than such adviser or trustee) owned in the aggregate more than 25 per centum of such voting securities for a period of at least six months prior to such transfer.

TITLE 15. COMMERCE AND TRADE

CHAPTER 2D. INVESTMENT COMPANIES AND ADVISORS

INVESTMENT COMPANIES
15 USCS § 80a-35 (2002)

Breach of fiduciary duty

(a) Civil actions by Commission; jurisdiction; allegations; injunctive or other relief. The Commission is authorized to bring an action in the proper district court of the United States, or in the United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person serving or acting in one or more of the following capacities has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts--

(1) as officer, director, member of any advisory board, investment adviser, or depositor; or

(2) as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company.

If such allegations are established, the court may enjoin such persons from acting in any or all such capacities either permanently or temporarily and award such injunctive or other relief against such person as may be reasonable and

appropriate in the circumstances, having due regard to the protection of investors and to the effectuation of the policies declared in section 1(b) of this title [15 USCS § 80a-1(b)].

17 CFR § 270 15 a-4

Temporary exemption for certain investment advisers.

Notwithstanding section 15(a) of the act, a person may act as investment adviser for an investment company pursuant to a written contract which has not been approved by a majority of the outstanding voting securities of such company during the one hundred and twenty day period after the termination of an investment advisory contract by an event (other than an assignment by an investment adviser in connection with which such investment adviser, or a controlling person thereof, directly or indirectly receives money or other benefit) described in paragraphs (3) or (4) of section 15 (a) of the act or by the failure to renew such contract *Provided* That:

(a) Such contract has been approved by the investment company's board of directors, including a majority of the directors who are not interested persons thereof and

(b) The compensation to be received under that contract does not exceed the compensation which would have been received under the most recent investment advisory contract that had been approved by the vote of a majority of the outstanding voting securities of the investment company.

By the Commission

George A. Fitzalmmons
Secretary
January 8, 1980

APPENDIX F

FOLD OUT EXHIBIT

MONTHLY STATISTICS OF MUTUAL FUNDS

Attn: Sam K

TABLE 1
MONTHLY STATISTICS OF MUTUAL FUNDS
(ALL DOLLAR FIGURES IN BILLIONS)

	ALL MUTUAL FUNDS			LONG-TERM FUNDS			MONEY MARKET FUNDS		
	FEB 2002	JAN 2002	FEB 2001	FEB 2002	JAN 2002	FEB 2001	FEB 2002	JAN 2002	FEB 2001
TOTAL SALES OF SHARES	$ 1,007.7	$ 1,231.8R	$ 929.7	$ 112.1	$ 132.9R	$ 112.6	$ 935.7	$ 1,098.9R	$ 817.1
NEW SALES	$ 1,001.7	$ 1,226.6R	$ 919.9	$ 108.1	$ 130.2R	$ 108.8	$ 933.6	$ 1,096.4R	$ 811.1
REINVESTED DIVIDENDS	$ 6.1	$ 5.2	$ 9.8	$ 3.9	$ 2.7	$ 3.8	$ 2.1	$ 2.5	$ 5.9
SALES DUE TO EXCHANGES	$ 56.2	$ 65.1R	$ 69.3	$ 32.6	$ 41.3R	$ 40.4	$ 23.6	$ 23.8	$ 28.9
TOTAL REDEMPTION OF SHARES	$ 1,030.1	$ 1,181.5R	$ 854.5	$ 88.5	$ 101.5R	$ 97.2	$ 941.6	$ 1,080.0R	$ 757.3
REDEMPTIONS DUE TO EXCHANGES	$ 55.6	$ 63.6	$ 69.7	$ 34.6	$ 37.3R	$ 45.2	$ 21.0	$ 26.2	$ 24.5
NET SALES	$ 17.6	$ 50.3R	$ 75.2	$ 23.6	$ 31.4R	$ 15.4	$ -6.0	$ 18.9	$ 59.8
NET NEW SALES	$ 11.6	$ 45.1R	$ 65.4	$ 19.7	$ 28.7R	$ 11.6	$ -8.1	$ 16.4	$ 53.8
NET NEW CASH FLOW	$ 12.2	$ 46.7R	$ 65.1R	$ 17.7	$ 32.7R	$ 6.8	$ -5.0	$ 14.0	$ 58.2
TOTAL NET ASSETS	$ 6,920.3	$ 6,971.2R	$ 6,897.0	$ 4,619.0	$ 4,667.7R	$ 4,878.3	$ 2,301.3	$ 2,303.5R	$ 2,018.7
NUMBER OF FUNDS	8,346	8,343R	8,158R	7,333	7,327R	7,124R	1,013	1,016R	1,034
NUMBER OF SHARE CLASSES	18,240	18,161R	16,915R	16,286	16,208R	15,070R	1,954	1,953R	1,845

(c) 2002 Investment Company Institute

Funds that invest exclusively in other mutual funds are excluded from all tables except TABLE 9.
Definitions of terms can be found in the endnotes page.

All statistics contained in this report are for open-end mutual fund companies, including variable annuities registered under the Investment Company Act of 1940.

BEST AVAILABLE COPY